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THE
MECHANICS' LIEN ACTS

OF
ONTARIO, W. J. NELSON,
BARRISTER AND SOLICITOR,
ROSSLAND, B. C.
(R. S. O. (1897); CAP. 153)

MANITOBA
(60 VICTORIA, MAN., CAP. 29)

AND
BRITISH COLUMBIA,
(R. S., CAP. 132)

WITH ANNOTATIONS, AND ADDITIONAL FORMS
OF PROCEEDINGS THEREUNDER.

W. J. NELSON,
BARRISTER AND SOLICITOR,
ROSSLAND, B. C.

BY

GEORGE SMITH HOLMESTED
*(Of Osgoode Hall, Barrister-at-Law, and Senior Registrar
of the High Court of Justice for Ontario.)*

TORONTO
1899

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TORONTO,
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COLBORNE ST.

12-21-57 SP

COMPARATIVE TABLE

OF THE

Mechanics' Lien Acts of Ontario, Manitoba, and British Columbia,

Showing the corresponding sections in each Act.

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ABBREVIATIONS USED IN THIS WORK.

A. R.	Ontario Appeal Reports.
Abb. Pr.	Abbott's Practice Reports, New York.
Abb. Pr. N. S. N. Y.	Abbott's Practice Reports, New York, New Series.
App. Cas.	English Law Reports, Appeal Cases.
App. R.	Ontario Appeal Reports.
Atk.	Atkyns' Reports.
B. & Ald.	Barnwall & Alderson's Reports.
B. & S.	Best & Smith's Reports.
Barb.	Barbour's Reports, N. Y.
Bing. N. C.	Bingham's New Cases.
Cart.	Cartwright's cases on British North America Act.
C. L. J.	Canada Law Journal.
C. L. T.	Canada Law Times.
C. P.	Upper Canada (now Ontario) Common Pleas Reports.
Con. Rules	Consolidated Rules of Supreme Court of Judicature for Ontario, of 1897.
Cab. & Ellis	Cababé & Ellis' Reports.
Cal.	California Reports.
Cameron's Opinions	Opinions of the late John Hillyard Cameron, Q.C.
Cass. Dig.	Cassel's Digest of the Reports of the Supreme Court of Canada.
Chy. Ch. R.	Chancery Chambers Reports (Ontario).
Chy. D.	English Law Reports, Chancery Division.
Col.	Colorado Reports.
Conn.	Connecticut Reports.
D. B.	Decree Book, Court of Chancery, Ontario.
D. G. & Sm.	DeGex & Smale's Reports.

LIST OF ABBREVIATIONS.

xv.

E. & B.	Ellis & Blackburn's Reports.
E. D. Smith (N. Y.)	E. D. Smith's New York Reports.
Ex.	Exchequer Reports (English).
Gr.	Grant's Chancery Reports, Ontario.
Gratt.	Grattan's Reports.
Holmsted & Langton	Judicature Act of Ont. and Con. Rules of Practice. (H. & L's. Ed. 1898).
H. L.	House of Lords Cases.
How. Pr.	Howard's Practice Reports (N. Y.).
Ill.	Illinois Reports.
Ill. App.	Illinois Appeal Reports.
Kan.	Kansas Reports.
L. R. Chy.	Law Reports, Chancery Appeals, (English).
L. R. C. P. D.	Law Reports, Common Pleas Division, (English).
L. R. Ex.	Law Reports, Exchequer, (English).
L. R. Chy.	Law Reports, Chancery, (English).
L. T. Jo.	Law Times, Journal, (English).
L. T.	Law Times Reports, New Series, (English).
M. & W.	Meeson & Welsby's Reports.
Man.	Manitoba Reports.
Mass.	Massachusetts Reports.
Md.	Maryland Reports.
Mich.	Michigan Reports.
Minn.	Minnesota Reports.
Miss.	Mississippi Reports.
Miss. App.	Mississippi Appeal Reports.
Mo.	Missouri Reports.
N. J. L.	New Jersey Law Reports.
N. W. R.	North-Western Reporter (N. S.).
N. Y.	New York Reports.
O. R.	Ontario Reports.
Ont.	" "

P. R.	Practice Reports, Ontario.
Penn.	Pennsylvania Reports.
Penn. St.	Pennsylvania State Reports.
Phila.	Philadelphia Reports.
Phillips	Phillips on Mechanics' Liens.
Q. B. D.	Law Reports, Queen's Bench Division (English).
Rep. Ch.	Reports in Chancery (English).
R. S. O.	Revised Statutes of Ontario, 1897.
S. C.	Same case.
S. C. R.	Reports of Supreme Court of Canada.
Sup. C. N. Y. Hun	Supreme Court of New York Reports, Hun.
Taunt.	Taunton's Reports.
U. C. L. J.	Upper Canada Law Journal, Old Series.
U. C. Q. B.	Upper Canada Queen's Bench Reports.
U. S.	United States Reports.
Wall.	Wallace's Reports, Supreme Court, United States
Watts & Serg.	Watts & Sergeant's Reports, Supreme Court, Pennsylvania.
Wis.	Wisconsin Reports.

Addenda et Corrigenda.

- p. 10. 17th line from top of page, for "39 Id.," read "37 Conn."
- p. 22. 4th line from bottom of page, for "Brydon v. Lutz, 9 Man. 63," read
"Brydon v. Lutes, 9 Man. 463."
- p. 25. at the end of 2nd paragraph, add "but see *Good v. Toronto H. & B. Ry.*, 35 C. L. J. 278."
- p. 141. 12th line from top of page, after "may be," add "see *In re Ribble v. Aldwell*, 34 C. L. J. 123."

Revised Statutes of Ontario (1897).

CHAPTER 153.

AN ACT RESPECTING LIENS OF MECHANICS, WAGE- EARNERS AND OTHERS.

- SHORT TITLE, s. 1.
INTERPRETATION, s. 2.
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WHO ENTITLED TO LIEN, s. 4.
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PROPERTY ON WHICH LIEN ATTACHES, s. 7.
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OVER WHAT, LIENS SHALL HAVE PRIORITY, s. 13.
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MATERIALS NOT TO BE REMOVED TO PREJUDICE OF LIEN, s. 16.
REGISTRATION OF CLAIM, ss. 17-22.
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DEATH OF LIENHOLDER, s. 26.
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TAKING SECURITY NOT TO PREJUDICE, s. 28.
LIENHOLDERS ENTITLED TO INFORMATION FROM OWNERS, ss. 29, 30.
ENFORCING LIENS BY ACTION, ss. 31-38.
NEW TRIAL AND APPEALS, s. 39.
COSTS, ss. 40-45.
PAYMENT OUT, OF MONEYS IN COURT, s. 46.
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FORMS AUTHORIZED, s. 49.
ACT NOT TO APPLY TO LIENS ARISING BEFORE 7TH APRIL, 1896. s. 50.
PERSONS ENTITLED TO LIEN ON CHATTELS MAY SELL SAME, s. 51.
HOW FAR ACT APPLIES TO RAILWAYS, s. 52.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :

Section 1.
Short title.

1. This Act may be cited as "*The Mechanics' and Wage-Earners' Lien Act.*" 59 V. c. 35, s. 1.

Previous legis-
lation

The first *Mechanics' Lien Act* passed in Ontario was 36 Vict. c. 27 (1873). It restricted the right of lien on the land, to those who had contracted directly with the owner of the land ; but it gave to sub-contractors the right of serving notice of their claims upon the owner, and upon such notice being served, authorized the owner to pay their claims, out of any money due by him to the contractor primarily liable therefor. This Act was subsequently amended in 1874, by 38 Vict. c. 20, which gave sub-contractors also a right of lien on the land. These Acts were subsequently consolidated by the R. S. O. (1877), c. 120. After this consolidation the Consolidated Act was further amended by 45 Vict. c. 15, which gave certain extraordinary rights of lien to wage earners, in respect of thirty days' wages : and additional amendments were made by 47 Vict. c. 18, and 50 Vict. c. 20.

The principal changes effected by these latter Acts were the avoiding of all agreements to prevent the at-

taching of mechanics' liens, except as between the actual parties to such agreements ; and providing that liens for thirty days' wages or less should have the same priority after, as they had before registration ; and as to the procedure for enforcing, and discharging liens.

Section 1.

These Acts and amending Acts were subsequently consolidated in R. S. O. (1887), c. 126. Subsequently further amendments were made by 53 Vic. c. 38, which made a change in the per centage required to be retained by an owner ; and by 53 Vict. c. 37 and 56 Vict. c. 24, which introduced a special form of procedure for the enforcement of mechanics' liens. All of these Statutes were repealed by 59 Vict. c. 35, and the present Act is a consolidation of the Act of 1896 (59 Vict. c. 35) as amended by 60 Vict. c. 24.

As to the extent to which former Acts were repealed : see 59 Vict. c. 35, s. 52.

The lien of mechanics on lands or buildings, for labour or materials expended thereon, is a purely statutory right ; no such lien existed at Common Law.

It has been held that when a lien attaches, the statute, being remedial, is to be liberally construed ; but on the question whether the lien attaches a different rule should obtain, because, liens being in derogation of the Common Law, the Court should not extend the statute beyond the cases specially provided for : *Trask v. Searle*, 121, Mass. 229, and see *Flagstaff Silver Mining Co. of Utah v. Cullins*, 104 U. S. 176 ; and *per Begbie, C.J. Haggerty v. Grant*, 2 B. C. R. 176. Construction
of Act.

Section 2.

Interpretation

2. Where the following words occur in this Act, or in the schedules hereto, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears :—

“ Contractor.”

1. “ Contractor ” (*a*) shall mean a person contracting with or employed directly by the owner or his agent for the doing of work or placing or furnishing materials for any of the purposes mentioned in this Act ;

“ Sub-con-
tractor.”

2. “ Sub-contractor ” (*b*) shall mean a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid, but contracting with or employed by a contractor, or under him by another sub-contractor ;

“ Owner.”

3 “ Owner ” (*c*) shall extend to and include any person, [firm, association, body corporate or politic, including a municipal corporation and railway company] (*d*) having any estate or interest in the lands upon or in respect of which the work or service (*e*) is done, or materials are placed or furnished, at whose request and upon whose credit or on whose behalf or with whose privity or con-

sent (*f*) or for whose direct benefit any such work or service is performed or materials are placed or furnished, and all persons claiming under him (*g*) or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished ;

Section 2.

4 "Person" (*h*) shall extend to and include a body corporate or politic, a firm, partnership or association ;

5. "Material" or "materials" shall include every kind of movable property. 59 V. c. 35, s. 2 (1-5).

6. "Wages" shall mean money earned by a mechanic or labourer for work done, whether by the day or as piece work ; 59 V. c. 35, s. 13 (6).

7. "Registry office" shall include land titles office. 59 V. c. 35, s. 2 (6).

(a) "**Contractor.**" The primary meaning of "contractor" is any one who contracts. In this Act however, and in the annotations upon it, the term is restricted to those persons only, who contract directly with the "owner." Every person contracting directly with the

"Contractor,"
definition of.

Section 2. "owner" is a "contractor" under the Act. Where, therefore, the "owner" contracts with several different persons to construct different parts of a building, each person so contracted with is a "contractor," and each "contractor" would appear to be a lien-holder of the same class, (see *Bunting v. Bell*, 23 Gr. 584); and although in this Act the distinction between different classes of lien-holders is not pointedly maintained, as in the former Mechanics' Lien Acts of Ontario, yet in practice, it would seem necessary to bear it in mind.

A mere wage earner if employed by an owner would be a "contractor" within the meaning of the Act.

"Sub-contractor," definition of.

(b) "**Sub-contractor.**" By the definition here given of a "sub-contractor" it would seem to include all sub-contractors, in however remote a degree they may stand from the original "contractor." For example, if A contracts with the "owner" to build a house, and then B contracts with A to do the painting and papering, B is a "sub-contractor," and as this *section* in effect declares that any person employed by a "sub-contractor" is himself a "sub-contractor," it follows that if C contract with B to do part of the painting, and D contract with B to do the papering, and E contract with C to furnish the paint and F contract with D. to furnish the paper, B, C, D, E, and F are all sub-contractors under the Act, and as such entitled to liens.

The Act in some places appears to treat persons working for wages as a class distinct from contractors, or sub-contractors; but it is clear that such persons must, according as their contract is made either with an owner, or a contractor, or sub-contractor, come under one or

other of these classes, though by reason of the preference given to wage earners they constitute to some extent, when sub-contractors, a preferential class.

Section 2.

(c) **"Owner."** It is important to bear in mind that the lien given by this Act to "contractors" and "sub-contractors" is to attach upon the estate and interest, legal and equitable, of the "owner" in the building, erection, or mine, upon, or in respect of which, the work is done, or the materials or machinery placed or furnished, (see *section 7*). This *section* provides, that the word "owner" is to extend to, and include persons firms and bodies corporate having "any estate or interest in the lands upon or in respect of which the work is done, or materials or machinery are placed or furnished, *at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work or service is performed or materials are placed,*" etc. The word "owner," therefore, includes all persons, firms and bodies corporate however small their interest in the land may be, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit, any work is done, etc. But persons or corporations contracting for work or materials, can only bind their own estates and interests, and cannot bind the estates and interests of other persons then interested in the land. Thus, a landlord's interest is not bound by contracts made with his tenant to which the landlord is no party, even though the latter have knowledge that the work is being done, or material being furnished, on the land, and though in certain contingencies he may, and in fact does, become entitled to the benefit thereof: *Graham v. Williams*, 9 O. R. 458 ;

"Owner," definition of.

Persons contracting, can only bind their own interests in the land.

Section 2. *Cornell v. Barney*, 33 Sup. C. N. Y., Hun. 134. And a

Tenant at sufferance, is not agent of owner of fee.

tenant at sufferance is not agent for, nor can he bind the owner, by his contracts: *Proctor v. Tows*, 115 Ill. 138.

Where it is sought to charge the landlord's estate with liens for work or materials contracted for by his tenant, the consent in writing of the landlord must be obtained: see section 7 (2); *Graham v. Williams*, 9 O. R. 458.

Dowress not bound by contract of her husband.

Neither is the dower of a wife bound by a contract made with her husband: *Shaeffer v. Weed*, 8 Ill. 513; *Gore v. Cather*, 23 Ill. 634; *Phillips*, s. 195. But where the husband acquires the land after the lien has attached, the lien will have priority over the dower: *Ib.*

Contract with purchaser, vendors' interest when bound thereby.

Where a verbal contract for the sale of lands was made on the understanding that the purchaser should proceed and erect buildings thereon; and the purchaser accordingly erected buildings thereon, it was held that there had been such an act of part performance as to make the purchaser in equity the owner of the land, and that a mechanics' lien in respect of such buildings attached on his interest, and the vendor could after that only hold the land subject to such lien: *Blight v. Ray*, 23 O. R. 415: and the vendor in that case having urged the mechanic to go on and finish the work, it was held, even though he did not expressly guarantee the payment therefor, that the work must be taken to have been done with his privity and consent and that his interest as vendor was also bound by the lien: *Ib.*

Contract under which lien arises must be binding on "owner."

In order that a lien may attach under this Act it is necessary that the original contract, by virtue of which it is claimed to arise, be one that is binding on the "owner" whose interest is sought to be charged. It is not neces-

sary that the contract of the lien-holder himself should be made directly with the "owner," otherwise all sub-contractors would be excluded from the benefit of a lien, but, generally speaking, it is necessary that the person legally liable to the contractor under whom a sub-contractor directly or indirectly claims, shall have some estate or interest in the land on which the lien is claimed. Section 2.

Work done or materials furnished at the request of a person having no interest in the land, will confer no lien upon the land. Thus where in fulfilment of a policy, a house is rebuilt by an insurance company upon the land of the insured, no lien for the work or materials will under such circumstances attach upon the land : *Phillips*, s. 82. Contract with person having no interest in land.

Where the contract, by virtue of which the lien is claimed, is made with an "owner" who is a minor, or lunatic, no lien could be enforced under the Act by the contractor or any sub-contractor, because minors and lunatics are incapable of binding either themselves, or their lands, by contracts for the erection of buildings, or improvements on their property. And it would seem that a contract made with a guardian of a minor, without the sanction of some competent court, for the erection of a building on the minor's land, would not give any right to a lien under this Act : *McCarthy v. Carter*, 49 Ill. 53 ; *Copley v. O'Neil*, 57 Barb. 299 ; and see *Collins v. Martin*, 41 U. C. Q. B. 602 ; *Phillips* ss. 108-111. Contract with minor, or lunatic,

Formerly where the owner of the land was a married woman, as a general rule, she must have been bound by any contract, express or implied, under which any Contract with husband, to do work on wife's land, effect of.

Section 2.

buildings or improvements were erected, or made upon her land, otherwise no lien would attach upon her interest in the land for the price. Formerly a wife's interest in the land was not bound because the work had been done, or the materials had been furnished, at her husband's request, unless it could be expressly established that the husband acted as the wife's agent; the relationship of husband and wife did not, of itself, raise any presumption that the husband acted as his wife's agent; and where a husband, on his own responsibility, procured a building to be erected on his wife's land, without her consent or concurrence, it was held that she was not liable for the price: *Wagner v. Jefferson*, 37 U. C. Q. B. 551; *Esslinger v. Huebner*, 22 Wis. 602; *Newcombe v. Andrews*, 41 Mich. 518; *Woodruff Iron Works v. Adams*, 39 Id. 233; *Wright v. Hood*, 5 N. W. R. 488; *Wendt v. Martin*, 89 Ill. 139; *Geary v. Hennessy*, 9 Ill. App. 17; *Little v. Vredenburg*, 16 Ill. App. 189.

The law, however, has now been very materially changed on this point by the present Act, and by *sec. 5 post*, a husband who procures work to be done, or materials to be furnished, in respect of his wife's land is to be conclusively presumed to have acted as her agent, unless the person doing such work or furnishing such materials has before doing the work or furnishing the materials express notice to the contrary.

Contract with trustee.

A contract made with a trustee having power to build will bind the trust estate: see *Taylor v. Gilsdorff*, 74 Ill. 354.

(d) "firm, association, body corporate, &c." The words within brackets are new, and are intended to extend

the definition of 'owner' to other persons and bodies corporate whose estates or interests in land could not formerly be bound by mechanics' liens: see notes to *sec. 4, post*. Under the former Act the word "person" by force of *The Interpretation Act*, s. 8, s.-s. 12, included any body corporate or politic.

Section 2.

(e) **"or service."** These words are new; whether they really add anything to the force of the *section* remains to be seen. They seem to be intended to cover something other than manual labour, and may include engineering calculations or services of that kind rendered in respect of contemplated buildings, or improvements on land as distinguished from work and labour done actually upon the land itself. A nominal distinction is made between "work" and "services" by *section 22 (3), (4), post*, as regards the time for registering liens therefor.

(f) **"with whose privity or consent."** Mere knowledge of the existence of the contract, or of the performance of the work, or supplying of materials, is not sufficient: see *Graham v. Williams*, 8 O. R. 478; 9 O. R. 458; *Flack v. Jeffrey*, 10 M. R. 514. Nor will the fact that repairs are made by a lessee pursuant to a covenant in his lease, which provides that the cost of them may be deducted from the rent, make the estate of the lessor liable to a lien so acquired: *Garing v. Hunt*, 27 O. R. 149. But an owner standing by, and inducing credit to be given to another, upon the representation that such other person is the owner, may be estopped in equity from afterwards setting up his title adversely to the claim of a lienholder, whose lien has been acquired under such

Privity or
consent of
"owner."

Estoppel of
"owner."

Section 2.

circumstances : *Higgins v. Ferguson*, 14 Ill. 269 ; *Donaldson v. Holmes*, 23 Ill. 85 ; *West v. Elkins*, 14 C. L. T. 50 : and where a person has entered into a verbal contract for the sale of land knowing that the purchaser intends to erect buildings, which he accordingly does, the vendor cannot thereafter claim the land to the prejudice of liens created, by virtue of the erection of such buildings, on the interest of the purchaser ; and where the vendor under such circumstances encouraged the contractors with the purchaser to go on with the work and assured them that they need not be afraid of not getting paid, it was held that the vendor's interest was also bound, by liens for work thus done, as the work was done "with his privity and consent" within the meaning of this section : *Blight v. Ray*, 23 O. R. 415 ; but see *Flack v. Jeffrey*, 10 M. R. 514. And where builders contracted with one H. to erect buildings on land then owned by them which they then agreed to, and subsequently did, convey to H. it was held that the interest of H. was liable as that of the "owner" within the Act, and bound by the liens of a sub-contractor under the builders in respect of the buildings so erected : *Reggin v. Manes*, 22 O. R. 443.

Persons claiming under "owner," how far bound by liens.

(g) "and all persons claiming under him." These words, when taken in connection with section 7, would seem to indicate that the intention of the Act was to prevent the claim of a lien holder from being defeated either by the death of the "owner" with whom the lienholder, directly or indirectly, contracts ; or by his transferring his interest in the property to another after the lien has attached ; and this view was adopted by the

court in *Makins v. Robinson*, 6 O. R. 1 ; and see *Reggin v. Manes*, 22 O. R. 443 ; *Hilton v. Merrill*, 106 Mass. 528 ; *Smith v. Norris*, 120 Mass. 58 ; *Gale v. Blaikie*, 126 Mass. 274 ; *Amidon v. Benjamin*, Ib. 276 ; *Ettridge v. Bassett*, 136 Mass. 314 ; but where the "owner" with whom the lien-holder directly or indirectly contracts, has, subsequently to the lien attaching, a mere momentary seizin, as where the property is conveyed to him, and he contemporaneously mortgages it back to his grantor, the lien would not, it seems, attach upon the estate of the mortgagee, (see *post*, section 7 (1), note *b*) : but subject to this exception, the intention of the Act seems to have been that all persons claiming under the "owner" with whom the contract is directly or indirectly made, whose rights accrue after the work or materials, in respect of which the lien is claimed, have been commenced to be done, or furnished, should take subject to the lien, provided it be duly enforced as provided by the Act (see sections 23, 24, 25). But it has been held in the United States, that in order that a lien may prevail as against a subsequent mortgagee without notice, it is necessary that the contract be precise and definite, and not subject to be affected, modified, or changed at the will of one of the parties : *Manchester v. Searle*, 121 Mass. 418.

Section 2.

Instantaneous
seizin.

But in the present state of the authorities in Ontario it would seem that a subsequent grantee or mortgagee of the "owner" may acquire priority over the lien holder, by prior registration ; *Douglas v. Chamberlain*, 25 Gr. 289, 290 ; *Hynes v. Smith*, 27 Gr. 150 ; *McLean v. Tiffin*, 13 App. R. 1 ; *Re Craig*, 3 C. L. T. 501 ; *Reinhart v. Shutt*, 15 O. R. 325 ; *McNamara v. Kirkland*,

Effect of prior
registration

Section 2. 18 App. R. 270. These cases proceed on the assumption that *The Registry Act* applies to mechanics' liens, although section 19 of the former Act, (R. S. O. (1887) c. 126), expressly declared, as does *section 21* of this Act, that it is not to apply to them, except as by the Act is provided, (see *post*, *sections 17-25*). It has been argued, therefore, that these cases do not correctly interpret the statute: see 22 C. L. J. 355, 356.

Makins v. Robinson, how far reconcilable with *McVean v. Tiffin*.

Assuming the reasons upon which these cases are founded to be correct, it has been suggested: see *Reinhart v. Shutt*, 15 O. R. 325, that they in effect overrule the decision of Ferguson, J., in *Makins v. Robinson*, *supra*. It may, however, be well to observe that the facts in the latter case were essentially different from those in *Hynes v. Smith* and *McVean v. Tiffin*. In those cases, what was sought to be done, was to add a subsequent mortgagee as a party in the Master's office, after the time limited by the Act for bringing a suit to enforce the lien had expired; and inasmuch as the suit is not commenced as against parties added in the Master's office until such parties are actually added (see *Bank of Montreal v. Haffner*, 29 Gr. 319; 10 App. R. 592; S.C. *sub. nom. Bank of Montreal v. Worswick*, Cass. Dig. 289; *McGraw v. Bayard*, 96 Ill. 146; *Gardner v. Watson*, 18 Ill. App. 386; *Lamb Campbell*, 19 Ill. App. 272), the plaintiff's right as against such subsequent mortgagee had in fact expired: see *post*, *sections 23, 24*, (*sed vide Cole v. Hull* 13 P. R. 100); whereas in *Makins v. Robinson* the subsequent transferee was an original party defendant, and the action was commenced against him in due time. While, therefore, the actual decisions

arrived at in *Hynes v. Smith* and *McVean v. Tiffin* appear to have been quite correct on the facts presented in those cases, it is possible that the reasons assigned therefor may hereafter be found to need reconsideration. Certainly they seem somewhat difficult to reconcile with section 2, s.s. 3, which declares that the term "owner" is to include all persons claiming under the person with whom the contract is made, "*whose rights are acquired after the work or service in respect of which the lien is claimed is commenced, &c.*," and section 7 (1) which declares that the lien "shall attach upon the estate and interest of the *owner as defined by this Act*," and section 21, which declares "that except as herein otherwise provided *The Registry Act* shall not apply to any lien arising under this Act."

Section 2.
—

Assuming that *The Registry Act* does apply to mechanics' liens, as held by the court in *McVean v. Tiffin*, *supra*, it would seem that prior registration will not give priority over mechanics' liens of which the person claiming under the prior registered instrument had actual notice, before registration of the instrument under which he claims: see *Rose v. Peterkin*, 13 S. C. R. 677; *Wanty v. Robins*, 15 O. R. 474; *McNamara v. Kirkland*, 18 App. R. 271; *West v. Sinclair*, 28 C. L. J. 119.

Actual notice
of unregis-
tered lien,
effect of.

Where a mortgage is given to secure advances to be applied in the erection of a building upon land, and all the money is advanced before any of the work is done by persons who subsequently register liens, the interest of the mortgagee is not bound by such liens, except

Mortgage to
secure future
advances.

Section 2.
—Advances
after lien
attaches,
effect of.

as provided by *section 7 (3), post*: see *Cameron's Opinions*, p. 184; and see R. S. O. c. 136, s. 99.

It was held under the former Mechanics' Lien Act that when a mortgage was given to secure future advances, and was duly registered; and advances were made after a right of lien had been acquired under the Act, but before registration of the lien, and without any actual knowledge of the lien by the mortgagee, that the lien-holder was not entitled to priority over the claim of the mortgagee in respect of such subsequent advances: *Richards v. Chamberlain*, 25 Gr. 402; and see R. S. O. c. 136, s. 99: *Brooks v. Lester*, 36 Md. 65; *Robinson v. Williams*, 22 N. Y. 380; *Moroney's Appeal*, 24 Penn 372; *Martsoff v. Barnwell*, 15 Kan. 612; *Iaegé v. Bossieux*, 15 Gratt. 83; and where such advances were made after registration of the lien, but without actual notice thereof it was held that the lien was not entitled to priority as regards such subsequent advances: *Pierce v. Canada Permanent Loan & Savings Co.*, 24 O. R. 436; but under the present Statute a material change has been made in this respect, and advances made by a mortgagee either after actual notice of a lien or after registration of the lien, will, possibly, not be entitled to priority to the lien, even though made on the security of a prior registered mortgage: see *post*, *section 13 (1)*, 'The conflict between that *section* and R. S. O. c. 136, s. 99, is referred to, in the notes to *section 13 post*.

(h) "**Person.**" The definition here given extends the meaning of the word beyond that given in *The Interpretation Act* (R. S. O. c. 1,) s. 8, s.s. 13, to "a firm, part-

nership or association," under *The Interpretation Act* Section 2.
 "person" includes "any body corporate or politic, or
 party, and the heirs, executors, administrators or other
 legal representatives of such person, to whom the con-
 text can apply according to law."

3.—(1) Every agreement or bargain, verbal or written, express or implied, which has heretofore been made or entered into, or which may hereafter be made or entered into, on the part of any workman, servant, labourer, mechanic, or other person employed in any kind of manual labour intended to be dealt with in this Act, by which it is agreed that this Act shall not apply, or that the remedies provided by it shall not be available for the benefit of any person entering into such agreement, is and shall be null and void and of no effect as against any such workman, servant, labourer, mechanic, or other person
 (a), 59 V. c. 38, s. 3. Section 3.
Contracts
waiving ap-
plication of
Act to be void

(2) This section shall not apply to any foreman, manager, officer or other person whose wages are more than \$3 a day. 59 V. c. 38, s. 12.

(a) "workman, servant, labourer, mechanic, or other person." This section is a legislative prohibition

Section 3. against workmen contracting themselves out of the benefit of this Act. A provision is to be found in *The Workmen's Compensation for Injuries Act* (R. S. O. c. 160) s. 10, of a somewhat similar character.

The *section* is not intended to avoid all contracts waiving the benefits of the Act, but only those made by contractors, or sub-contractors, who come within the definition of "workman, servant, labourer, mechanic, or other person doing manual labour": probably the doing of manual labour is one of the tests to be applied in determining who come within the operation of the *section*. *Sub-section* (2) further limits the application of the *section* to those earning less than \$3 a day.

Section 4. **4.** Unless he signs an express agreement
 Nature of lien. (a) to the contrary, and in that case subject to the provisions of section 3, any person (b) who performs any work or service (c) upon or in respect of, or places or furnishes any materials (d) to be used (e) in the making, constructing (f), erecting, fitting, altering, improving or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, or fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit and ornamental trees, or the appurtenances to any of them, for any owner, contractor or

sub-contractor, shall by virtue thereof have a lien (*g*) for the price of such work, service or materials upon the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit and ornamental trees, and appurtenances thereto, and the lands occupied thereby or enjoyed therewith (*h*), or upon or in respect of which the said work or service is performed, or upon which such materials are placed, or furnished to be used, limited, however, in amount (*i*) to the sum justly due to the person entitled to the lien and to the sum justly owing (except as herein provided) (*j*) by the owner. 59 V. c. 35, s. 5 ; 60 V. c. 24, s. 1.

(a) **“Unless he signs an express agreement.”** It is obvious, from these words, that a parol agreement to waive the right of lien, is ineffectual. The agreement must be express, and not to be gathered by implication, and must be signed by the party who would, but for the agreement, be entitled to the lien. An agreement binds only the party who signs it, and probably his representatives, (see *section 6*, note (*b*)), but not any sub-contractor. Prior to the 47 Vict. c. 18, s. 1, a “contractor” might

Section 4.
Nature of lien.

Agreement to
waive right to
lien must be
in writing,
and express.

Section 4. by his agreement, deprive all sub-contractors under him of the right of lien : *Forhan v. Lalonde*, 27 Gr. 600.

Rights of sub-contractors to lien, how far affected by agreements between "owner" and contractor.

Persons entering into contracts as sub-contractors in the expectation of acquiring a lien under the Act, before engaging in the work, or furnishing materials; should nevertheless inquire of the "owner" at whose instance the work is being done, or materials furnished, whether there be any agreement between him and the "contractor" debarring the latter, or his sub contractor, from claiming a lien. For although the right of sub-contractors to liens can only be barred by an express agreement between themselves and the "owner," yet their liens may perhaps be rendered fruitless by the "owner" stipulating with the "contractor," not only that the latter shall not be entitled to any lien, but also that in the event of any lien being claimed or registered by any sub-contractor under him, the money payable under the contract shall be forfeited ; because the lien of a "sub-contractor" is, by *sections* 9 and 10, limited to what is due by the "owner" to the "contractor," and if nothing be due, the "sub-contractor" can get no benefit from his lien : *Briggs v. Lee*, 27 Gr. 464 ; *Ferguson v. Burk*, 4 E. D. Smith (N. Y.) 760 : *Allen v. Carman*, 1 E. D. Smith (N. Y.) 692 ; *Linn v. O'Hara*, 2 E. D. Smith (N. Y.) 560 : see, however, *section* 11, and notes.

Minor may acquire right of lien.

(b) "**any person.**" See the definition of the word "person" s. 2, s.s. 4, *ante*, p 5 A minor, though unable to bind himself by contract, may nevertheless if he actually do work, or furnish materials, be entitled to a lien therefor : *Phillips*, s. 38. "Sub-contractors" as well as "contractors" are included The extension of the right

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Section 4.

Architects,
when entitled
to lien.

Extent of lien
of contractor.

"Owner" can not claim lien on his own land.

Section 4. enforce in competition with liens of third parties :
Phillips, s. 39.

Performance
of work
requisite to
right of lien.

(c) **"performs any work or service."** As a general rule in order to entitle a mechanic, or material-man, to enforce a lien for his work or materials, the work must be done, and the materials must be furnished, substantially according to the original contract between the "owner" and the "contractor," whether the work be done, and the materials be furnished, by the "contractor" himself, or any "sub-contractor" under him. If there be any substantial variation[¶] from the contract, then there must be actual acceptance of the work and materials by the "owner," sufficient to create a new contract to pay for them, or he must have assented to the variation, or must himself have prevented the performance of the contract, or assented to its abandonment: see *Clayton v. McConnell*, 14 O. R. 608.

Variation
from contract.

Imperfect
performance
of contract.

Where buildings are erected on the land of another, or repairs or alterations are made to such buildings, the possession of the land by the owner necessarily involves possession of the buildings in their existing state, and no inference can be drawn merely from such possession, or even from actual user of the buildings so erected, altered or repaired, of an acceptance of an imperfect performance of the contract for the erection, alteration or repair thereof, so as to entitle the contractor to recover, either on the special contract or under the common counts a *quantum meruit*: see *Brydon v. Lutz*, 9 Man. 63; *Munro v. Butt*, 8 E. & B. 738; *Sumpter v. Hedges*, (1898) 1 Q. B. 673; 78 L. T. 378; *Ellis v. Hamlen*, 3 Taunt. 52; *Pattinson v. Luckley*, L. R. 10 Ex. 330;

Oldershaw v. Garner, 38 U. C. Q. B. 37; *Gearing v. Nordheimer*, 40 U. C. Q. B. 21; and *Wood v. Stringer*, 20 O. R. 148, where the user of pews in a church building was held to be no waiver of the right to object that they were not made according to contract.

There is no implied warranty, on the part of the "owner," that work can be done according to the plans and specifications furnished. The contractor who undertakes to perform work according to certain plans and specifications, in the absence of any stipulation to the contrary, does so at his own risk, and if the work cannot be completed in the manner specified, he cannot, nor does it seem possible that any sub contractor under him can, recover against the "owner" for the work actually performed: *Thorn v. Mayor of London*, L. R. 9 Ex. 163; S. C., L. R. 10 Ex. 112; except it be a wage-earner claiming under section 14, *post*. And where a contract was made to build and finish a house ready for occupation, and to deliver it so finished to the "owner," the delivery was not excused by the fact that, owing to a latent defect in the soil, the walls sunk and cracked, and the house became uninhabitable and dangerous, and had to be rebuilt: *Dermott v. Jones*, 2 Wall, 1. But the express acceptance of the work by the owner waives non-compliance with the specifications: *Havighorst v. Lindberg*, 67 Ill. 463. And a forfeiture for not completing the contract in time, is waived by payments made after the default, and urging the contractor to go on with the work: *Eyster v. Parrott*, 83 Ill. 517.

But when the deviation from a contract arises in respect of some matter, the performance of which does not constitute a condition precedent to the right to

Section 4.

No implied warranty that work can be performed according to specifications.

Express acceptance of work waives defect in performance.

Deviations as to matters not conditions precedent to right to recover.

Section 4.

recover, as, for instance, the completion of the work by a certain day, the value of the work may be recovered, and a lien therefor might in such case be enforced : *Lucas v. Goodwin*, 3 Bing, N. C. 737 ; and see *Thompson v. Yates*, 28 How. Pr. (N. Y.) 142.

How far performance of contract between "owner" and "contractor" is essential to right of a sub-contractor to recover.

Under a statute which provided that "every building shall be subject to a lien for the payment of all debts contracted for work done, or materials furnished for or about the erection or construction of the same," it was held that it was sufficient to entitle a sub-contractor, furnishing materials and work, to a lien therefor, that his work was in accordance with the contract made by him with the contractor, notwithstanding that as between the "owner" and the "contractor" there was no performance of the contract : *Rand v. Leeds*, 2 Phila. 160. It seems, however, unlikely that such a conclusion could be arrived at under this Act in the face of *section 10*, which limits the lien of a sub-contractor, to the amount payable to the contractor, or sub-contractor, through whom he claims. Under this provision any defence which the "owner" could set up against a claim by the "contractor" for the price, would seem equally available against any claim for a lien by any "sub-contractor" under him. See, however, *sections 11, 12, 13, 14*, which to some extent modify the rights of the owner so far as the percentage required to be retained by him is concerned ; and see the notes to those *sections*.

Exception in favour of wage-earners.

Although the general rule is, that sub-contractors cannot recover where there has been an imperfect fulfilment of his contract by the contractor through

whom they claim, an exception is made by *section 14*, Section 4.
 (2), (3), *post*, in favour of "wage-earners."

When the procuring of an engineer's or architect's certificate, is, by the terms of the contract with a "contractor," made a condition precedent to payment, the contractor, as a general rule, cannot recover the value of his work, either on the common counts, or under the contract, without first producing the certificate : *Sharpe v. San Paulo Ry. Co.*, L. R. 8 Chy. 597 ; *Tharsis Sulphur & C. Co. v. McElroy*, 3 App. Cas. 1040 ; *Lakin v. Nuttall*, 3 S. C. R. 685 ; *Jones v. The Queen*, 7 S. C. R. 570 ; *O'Brien v. The Queen*, 14 S. C. R. 529 ; *Coatsworth v. City of Toronto*, 7 C. P. 490 ; 8 C. P. 364 ; *Ekens v. Bruce*, 30 U. C. Q. B. 48 ; *Ferguson v. Galt*, 23 C. P. 66 ; *Reg. v. Crinon*, 23 S. C. R. 62 ; *Robinson v. Owen Sound*, 16 O. R. 121 ; *Gilbault v. McGreevy*, 18 S. C. R. 609.

Where the contract provided that no extras were to be allowed without the written authority of the owner, or his architect, it was held that the price of extras could not be recovered, unless the written authority of the owner, or his architect therefor, was proved : *Wood v. Stringer*, 20 O. R. 148.

A stipulation that an architect's certificate shall be final and conclusive, and shall not be set aside for any pretence, suggestion, charge or insinuation of fraud, collusion or confederacy, is not void as contrary to public policy : *Tullis v. Jacson*, 67 L. T. 340 ; and see *Peters v. Quebec Harbour Commissioners*, 19 S. C. R. 685.

But, although the production of the certificate may be essential as a condition precedent to the recovery by the

Production of
 engineer's or
 architect's cer-
 tificate, when
 a condition
 precedent
 to right to
 enforce lien.

Section 4.
—,

contractor, it is not necessarily so, where, the original contractor having failed in his contract, the owner agrees with a third party to go on and complete the work according to the original contract. In such a case, the completion of the work by such third party, so as morally to entitle him to a certificate, is all that need be shown: *Petrie v. Hunter*, 2 O. R. 233; 10 App. R. 127; *Lewis v. Hoare*, 44 L. T. 66.

Non-production of certificate, when excused.

So also, when a contractor is prevented from obtaining the certificate by the wrongful act of the "owner," he may recover on the common counts without the certificate: *Smith v. Gordon*, 30 C. P. 553.

Where a contractor is not entitled to recover, not by reason of an imperfect fulfilment of the contract, but by reason of his being unable to comply with a stipulation requiring a written authority for the performance of the work, or the supplying of the materials, it would seem that even under *section 14, (2), (3), post*, a sub-contractor under him, even though a wage-earner, would not be able to recover either: see *post, sections 9, 10*.

Work need not be actually done on land, if it finally go into the work contracted for

It is immaterial whether all the labour for which a lien is claimed is actually performed on the land, or in the workshop, or elsewhere, if it finally go into the work contracted for: see *Wilson v. Sleeper*, 131 Mass. 177; *Dick v. Stevenson*, 70 L. T. 424; *Phillips*, s. 40. But the work or services must be immediately connected with the erection, or the land on which the lien is claimed: *Ib. s. 155*.

(d) "**any materials.**" "Materials" includes every kind of moveable property: see *ante, section 2, s.-s. 5*. Powder, shell and candles, furnished for working a

mine, would be materials within this *section*: see *Key- stone v. Gallagher*, 5 Col. 23. Section 4.

(e) **“to be used.”** The question has frequently arisen in the United States whether it is essential, to entitle a material-man to a lien, that the material in respect of which the lien is claimed should have been actually incorporated in the building erected on the land upon which the lien is claimed: see *Phillips*, ss. 148-151. How far material must be incorporated in building, to entitle material-man to lien.

It has been held under a former Act that as between lien-holders *inter se* and for materials furnished to a “contractor,” (and a *fortiori* to a sub-contractor), that there is no lien under the Act, until the materials have been affixed to the building, or erection. But as between material-men and the “owner” of a building, the former have a lien for materials sold to the latter, to be used on the building, though not used, and others procured elsewhere. All that a claimant in the latter case is required to show, is the fact that the materials were furnished for the purpose of being used in constructing, or repairing, the building: see *Bunting v. Bell*, 23 Gr. 588. Questions may arise between different material-men, where both have sold on the credit of the building, the material of one having been used in its erection, and the other’s not, but such questions would have to be adjusted on the principles of equity: see *Esslinger v. Huebner*, 22 Wis. 602. There is no lien for unsuitable materials furnished, but not used: *Hunter v. Blanchard*, 18 Ill. 318.

(f) **“making, constructing, &c.”** The specific enumeration of the various kind of work, etc., for which For what work lien may be claimed.

Section 4.

a lien may now be claimed, sets at rest many questions which arose under statutes having a less extensive and specific description—but it cannot, even now, be said to preclude all such questions. It would still seem that no lien can be maintained for planing and sawing timber, without any agreement as to the use to be made thereof, although it is afterwards put into a building : *Bennett v. Shackford*, 93 Mass. 444. It has been held in Massachusetts that no lien can arise for merely hauling lumber and sand for a building : *Webster v. Real Est. Imp. Co.*, 140 Mass. 526, though if the sand or lumber be hauled by the person furnishing it, a lien could no doubt be claimed for the hauling as well as the price of the material : *Phillips*, s. 155 ; and in Pennsylvania it has been held that a lien may attach in favour of a teamster for hauling lumber for a building : *Hill v. Newman*, 38 Penn. 151, as also for labour done with derricks in hoisting materials : *Tizzard v. Hughes*, 3 Phila. 261 ; and such work if done upon or in respect of any erection or land would seem clearly to be within this *section*.

Hauling.

Hoisting.

Grading.

Filling in and grading the earth about buildings already erected, although not work for which a lien could be maintained under some Lien Acts : see *Pratt v. Duncan*, 32 N. W. R. 709 ; *Adamson v. Rogers*, 22 App. R. 415 ; 23 S. C. R. 159, seems now to be work for which a lien could be maintained under this *section*. It has been held under some Lien Acts that a lien does not attach for labour in tearing down : *Holzhour v. Merr*, 59 Mo. 434, or removing a building : *Trask v. Searle*, 121 Mass. 229 ; *Stephens v. Holmes*, 64 Ill. 336 ; but under this

Tearing down,
and removing
buildings.

section it would seem that a lien might be claimed for such work, as work done upon or in respect of land. Section 4.

It has also been doubted whether any lien would attach under some statutes in the United States for work upon, and material for, fences : see *Hubbard v. Brown*, 90 Mass. 590 ; *Canisius v. Merrill*, 65 Ill. 67. But a fence is now expressly within this *section*. A drain-pipe has been held to be part of a house for which a lien may be claimed : *Hubbard v. Brown*, 90 Mass. 590 : and it is also clearly a work for which a lien may be claimed under this *section*. Fences.
Drain.

When a lien is claimed for putting in a furnace and ranges, the question whether the transaction was the mere purchase and sale of a chattel, or the furnishing materials for the building, is said to be a mixed question of law and fact : *Turner v. Wentworth*, 119 Mass. 459 ; and see *The Scottish American Investment Co. v. Sexton*, 26 O. R. 77. As to a boiler, see *Kelly v. Border City Mills*, 126 Mass. 148. The erection of a lightning rod was held not to come under the head of building, altering, repairing or ornamenting a building : see *Drew v. Mason*, 81 Ill. 498 ; and see *Bennett v. Shackford*, 93 Mass. 444 ; and a scene painter for a theatre cannot for painting scenes acquire a lien on the leasehold interest of a lessee of the theatre, by whom he is employed : see *Garing v. Hunt*, 27 O. R. 149. Furnaces.
Boiler.
Lightning rod

(g) "**shall by virtue thereof have a lien.**" Notwithstanding a similar generality of the words in the former *Mechanics' Lien Act*, (R. S. O. (1887) c. 126), it was held that the right of lien did not arise where the work had been done, or materials supplied upon property not liable to be sold in execution. Thus Lands liable to lien.

- Section 4. it was held that there was no lien for work done on public school buildings; *Robb v. Woodstock School Board*, per Proudfoot, J., at Woodstock, April, 1880, because such buildings are not liable to sale in execution: *Scott v. Burgess*, 19 U. C. Q. B. 28; and see *Phillips*, ss. 179, 179a; *Thomas v. Urbana School Dis.*, 71 Ill. 283; *Board of Education v. Neidenberger*, 78 Ill. 58; *sed vide contra Moore v. Bradley*, 5 Man. 49. Nor could the lands of a railway company be made subject to such liens: *Phillips*, s. 180; *Breeze v. Midland Ry. Co.*, 26 Gr. 225; *King v. Alford*, 9 O. R. 643. In the latter case, however, Proudfoot, J., dissented; and see *Hill v. Lucrosse & Mil. R. R. Co.*, 11 Wis. 214; *Phillips*, s. 182. And it has also been held in the United States that a court house: *Bouton v. McDonough County*, 84 Ill. 384; and buildings belonging to the State: *Thomas v. Industrial University*, 71 Ill. 310, are not liable to mechanic's liens.
- School buildings.
- Railway lands.
- Court house.
- Buildings belonging to the State.

Owing to the different wording of the present Act, however, it is possible that for work and materials of the kind mentioned in this *section*, done or supplied for municipal corporations, or for railway companies within Ontario, a lien may now be enforced. The principal differences between this Act and the former Act in this respect are to be found in *section 2*, s.-s, 3, which expressly includes municipal corporations, and railway companies, within the definition of "owner," this *section 4*, now under consideration, which expressly includes work or service upon or in respect of any railway, or materials furnished to be used in making or constructing any railway, as subjects for which a lien may be claimed, and *section 17 (3)*, which makes a special provision as

to the description of the lands where a lien is claimed against a railway company. Section 4.

It is, however, not perfectly clear that even under the present Act, a lien on municipal buildings in actual use, or the lands actually required for the use of any railway can be effectively enforced. It must be borne in mind that the reason of the decisions above referred to, was not that railways and municipal corporations were in terms excluded from the operation of the former Act (see *per* Proudfoot, J., 9 O. R., 647), but on the ground that the lands vested in those classes of corporations could not be sold in execution, as being contrary to public policy; and in the absence of any positive legislative reversal of that policy, it is just as effective now as it was when the decisions above referred to were pronounced. A learned writer on this subject says: "Property which is exempt from seizure and sale under an execution upon grounds of public necessity, must, for the same reason, be equally exempt from the operation of the mechanics' lien law, unless it appears by the law itself, that property of this description was meant to be included; *and to warrant that inference, something more must appear than the ordinary provisions that the claim is to be a lien against a particular class of property enforceable as judgments rendered in other civil actions*: *Phillips* s. 179, quoted with approval by Boyd, C., *King v. Alford* 9 O. R., at p. 647. The observations of Boyd, C., which follow also deserve attention. "Now railways generally, are in these days essential to public use and convenience, and they are, therefore restricted, on grounds of public policy, from being cut in pieces and destroyed by sales under legal

Section 4.

process.” These observations have the same force now as when they were made, and it is manifest that the argument based thereon against a right of lien in such cases seems still open even under the present Act. It might prove a very serious injury to the public, if a railway could be sold off in sections to satisfy liens for building station houses, or for making, or repairing the road bed, or laying rails, etc., or if public municipal buildings, in actual use, such, for instance, as registry offices, fire stations, etc., could be sold to satisfy mechanics’ liens. Executions against municipal corporations for the recovery of ordinary debts have to be enforced in a certain specific manner prescribed by the Legislature: see *The Municipal Act* (R. S. O. c. 223, s. 471); the only mode of enforcing the payment of a claim for a lien under this Act is by the sale of the property subject thereto: see *section 35 (2), post*, and if we regard the process for enforcing a lien as in the nature of an execution as it appears to be, (see *per* Ferguson, J., *King v. Alford*, 7 O. R., at pp. 653-4), we have a conflict of Statutes. In the same way, ordinary debts against a railway company cannot be enforced by sale, under execution, of the company’s roadway or stations, but only by the appointment of a receiver: see *King v. Alford, supra*: *Peto v. The Welland R. W. Co.*, 9 Gr. 455; *The Erie & Niagara R. W. Co. v. The Great Western R. W. Co.*, 19 Gr. 43. The question for judicial decision will therefore be, does the present Act so explicitly provide for the sale of lands of municipal and railway corporations to satisfy mechanics’ liens, as to override the express statutory provisions for the enforcement of executions against municipalities, or the well

settled practice of the Courts as regards the enforcing of debts due by railway companies. The further question may also arise, whether or not this Act must not be limited, in any case, to such part of the land of a railway company, or municipality, which is not actually required for the uses of the railway, or municipality, and the sale of which under execution will not interfere with the convenience and rights of the public.

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This *section*, it will be noticed, provides that any person who does work or furnishes material for the purposes enumerated "for any owner," shall have a lien therefor, and, as we have seen, *section 2*, s.-s. 3, expressly declares that municipal corporations, and railway companies, are included in the term "owner"; but it must also be remembered, as has already been pointed out, that under the former Act, (R. S. O. (1887) c. 126), the word "owner" included any "person," and under *The Interpretation Act*, (R. S. O. (1887) c. 1), s. 8, s.-s. 13, the word "person" also included corporations; so that municipal corporations and railway companies were within the definition of "owner" under the former Act, but still it was held not to enable liens to be enforced against them. Whether the explicit inclusion of them within the term "owner" will make any difference in the construction of the Act remains to be seen. This Act, in any case, can hardly be said to come up to the requirements which Mr. Phillips lays down in the passage above quoted as necessary, in order to override the ordinary law governing the recovery of debts against municipal, and railway, corporations.

With regard to railways under the control of the

Section 4. Dominion of Canada, a further question may arise as to how far the Legislature of Ontario has power to subject their property to mechanics' liens : see *post*, section 7, (1), note (c).

Lien-holder must be employed by some one having an interest in the land.

In order to entitle a person to a lien under the Act, it is absolutely necessary that he should have been employed to do the work, or furnish the materials, for which he claims a lien, by some person having either an interest in the land on which the lien is claimed, or an interest direct, or indirect, in a contract made with a person having an interest in the land. The employment by a person having neither an interest in the land, nor an interest in a contract made with an "owner" of the land, would give no right of lien under the Act : see section 2, note (c), *ante*, p. 7.

From what date lien attaches.

Commencement of work how far essential

A question may arise whether the lien attaches from the date of the employment, or from the date of the actual commencement of some part of the work, or furnishing some part of the materials. But it would seem clear that a lien does not arise merely by contract to do the work, and that, on the contrary, there can be no lien until the work is actually commenced, or the materials are begun to be furnished. The commencement of the lien would, therefore, appear to be coincident with the commencement of the work, or the furnishing of the materials, in respect of which it is claimed. The amount of the lien depends, it is true, on the amount due from the "owner" to the "contractor" in respect of the work and materials actually done and furnished ; but though this may vary from day to day as the performance of the contract progresses, yet, on the com-

pletion of the contract, the lien-holder would appear to be entitled to treat his lien as one claim dating from the commencement of the performance of the contract, and not as a series of cumulative liens arising from day to day as the contract was proceeded with: see *Hydraulic Press Brick Co. v. Bormans*, 19 Miss. App. 664; *Great Western Planing Mill Co. v. Bormans*, *Ib.* 671. But see *McLaughlin v. Green*, 48 Miss. 175, where it was held that the lien commences from the date of the contract.

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Lien relates back to commencement of work.

Where a contractor is dismissed and the owner makes an arrangement with a sub-contractor of the original "contractor" to finish the work; as to all work done after such arrangement the sub-contractor is entitled to a lien as a "contractor"; *Petrie v. Hunter*, 2 O. R. 233; 10 App. R. 127. Such a contract is not a contract to assume the debt, default or miscarriage of another, and need not be in writing: *Ib.*

Dismissal of "contractor," right of "sub-contractor" employed to finish work.

(h) "upon the erection, &c, and the lands occupied thereby, or enjoyed therewith." It is held in the United States that where a building is destroyed, removed, or in any manner severed from the land, the lien ceases to bind either the land, or the building: *Coddington v. Dry Dock Co.*, 31 N. J. L. 477; *Presbyterian Church v. Stettler*, 26 Penn. 246; *Phillips*, s. 12. So, where, before completion, the building was destroyed by fire, the builder has been held to have no lien: see *Tompkins v. Dudley*, 25 N. Y. 272; but see *contra*, *Freeman v. Carson*, 27 Minn. 516; *McLaughlin v. Green*, 48 Miss. 175; and see *post*, section 8; but a wrongful severance of the building from the land, has been held not to defeat the lien on the land: *Steigleman v.*

Removal or destruction of building, effect of, on lien.

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McBride, 17 Ill. 300. It is not probable, however, that under this Act the destruction, or removal, of the building would, in any case, be held to defeat the mechanic's lien on the land; because by this Act the lien is not given merely on the building, and on the land by inference, as a necessary adjunct, but it is expressly given, both on the land itself, as well as on the building: see *section 7 (1)*, and *section 8, post*, and notes

Transfer of building to another lot, effect of.

Where a building which is subject to a lien is subsequently transferred to another lot, the lien will not attach upon such other lot: *Underhill v. Corwin*, 15 Ill. 556; but where the building was sold by a person claiming under the "owner" with notice of the lien, it was held that the purchase money was subject to the lien: *Ellett v. Tyler*, 41 Ill. 449; *Austin v. Wohler*, 5 Ill. App. 300.

Sale under execution.

Where the land is sold under execution, or otherwise, the lien is transferred to the proceeds: *Phillips*, ss. 196-8.

Lien is an insurable interest.

The lien of the mechanic is held to be an insurable interest: *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285; and money received by reason of any insurance now takes the place of the property destroyed, and is subject to any liens it was subject to: *post*, s. 8.

The lien is also "a preferential claim" under *The Winding Up Act* (R. S. C. c. 129), s. 62; *Re Empire Brewing & Malting Co*, 8 Man. 424.

Amount for which lien may be claimed.

(i) "**limited, however, in amount.**" The lien is limited in amount to such sum as is justly due to the person entitled to such lien, that is to say, the lienholder cannot recover more than that sum; and the

concluding words of the *section* also limit the amount recoverable by what is due and owing by the "owner," except as subsequently provided by the Act. This clause must therefore be read in connection with *sections* 9 and 10: and from those *sections* it will appear, that although the lien-holder cannot recover more, he may not in all cases be entitled to recover against the owner, or his land, as much as is justly due to him from his primary debtor. Where the lien-holder is a "sub-contractor," the amount for which he is entitled to enforce his lien against the land, can—except in the case of a lien for wages, and except in the case of payments by the "owner" contrary to the provision of *section* (11)—never exceed the amount due by the "owner" to the "contractor," no matter how much more may be due to the lien-holder by the "contractor" or "sub-contractor," through whom he claims: *Briggs v. Lee*, 27 Gr. 464; and where there are several "sub-contractors" of the same "contractor" or "sub-contractor," each is entitled to a *pro rata* share of the amount which the "contractor" or "sub-contractor" through whom they claim, is entitled to receive from the "owner," (see *section* 13 (3); but see s. 14 (1), as to wages). For any excess due to the lien-holders, over and above what they can recover from the land, they are entitled, where suit is brought, to judgment against their primary debtors: *section* 47.

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(j) "**except as herein provided.**" The exceptions referred to seem to be those made by *sections* 11, 14, 15.

Section 5

Work done
or materials
furnished
on lands of
married
women.

5. Where work or service is done or materials are furnished upon or in respect of the lands of any married woman (*a*) with the privity and consent of her husband he shall be conclusively presumed (*b*) to be acting as well for himself and so as to bind his own interest, and also as the agent of such married woman for the purposes of this Act, unless the person doing such work or service or furnishing such materials shall have had actual notice to the contrary before doing such work or furnishing such materials. 59 V. c. 35, s. 3.

(*a*) "**lands of any married woman.**" This *section* is apparently introduced to overcome the danger which mechanics and others formerly incurred in doing work, and furnishing materials, for buildings on the lands of married women, at the request of their husbands. As already pointed out (*ante*, p. 10) it had previously been held that unless the husband was expressly authorized to act as his wife's agent her interest might not be bound by any lien under the Act. By this *section* the legal presumption now in such a case is, that a husband procuring work to be done, or materials furnished, in respect of his wife's land, is acting as her agent, and her interest, as well as his own, is bound, unless she is able to establish actual notice to the person doing the work or furnishing the material before the doing or furnishing

thereof, that her husband was not authorized to act for her. Section 5.
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Lands in which a married woman has merely an inchoate right of dower, would not appear to be the lands of the married woman, within this *section*: see *supra*, p. 8.

(b) "**conclusively presumed.**" The effect of these words is to preclude a married woman from showing that her husband was not her agent, unless she can also prove that the person claiming the lien, by virtue of her husband's order, had also actual notice, before doing the work or furnishing the materials for which the lien is claimed, that he was not her agent.

6. No agreement (a) shall be held to Section 6.
— deprive anyone otherwise entitled to a lien Contracts not
to deprive
third party
of lien under this Act, and not a party to the agreement (b), of the benefit of the lien, but the lien shall attach, notwithstanding such agreement. 59 V. c. 35, s. 4.

(a) "**No agreement.**" The object of this *section* is Agreement to
waive lien,
effect of. to prevent contractors, or sub-contractors, from entering into agreements which shall deprive their sub-contractors of the right of lien. Under this *section*, although a contractor might contract with the owner not to register, or claim, any mechanic's lien, yet, notwithstanding such an agreement, any person who might enter into a sub-contract, with such contractor to perform any part of the

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contract, would be entitled to claim a lien.* Although no agreement can deprive any but the party to it of the right to a lien, yet it is possible that an agreement might be made putting an end to the contract, or forfeiting the price payable thereunder, if any mechanic's lien should be registered by the contractor, or any sub-contractor under him, and inasmuch as the amount for which a sub-contractor is entitled to a lien cannot ordinarily exceed what is due by the owner to the contractor under whom such sub-contractor directly or indirectly claims, (see *post*, sections 9, 10), it is possible that the lien of the latter might be defeated notwithstanding this section, unless the agreement should be voidable under s. 14 (5) *post*.

By section 3, *supra* p. 17, certain contractors, or sub-contractors whose wages are less than \$3 a day, are absolutely debarred from making any agreement to deprive themselves of the benefit of the Act.

Agreement to
waive lien
does not bind
persons not
parties.

(b) "**not a party to the agreement.**" It would seem probable that all persons actually representing the estate of a person who has contracted to waive a right to a mechanic's lien, are bound by such an agreement though not actual parties to it; *e.g.*, the personal representative of a deceased contractor, or sub-contractor, who has made such an agreement, or his assignee would probably be held to be bound by the agreement, because such persons only take such right of lien, if any, as the deceased person, or assignor, as the case may be, had at the time of his death, or assignment. At the same

* A similar provision in a statute of the State of Pennsylvania was held to be unconstitutional as being an interference with the rights of contract: *Waters v. Wolf*, 162 Penn. 153, but no restrictions of that kind affect the legislative power of the Legislature of Ontario in such matters.

time it may be argued that but for the agreement they would have been entitled to a lien, and are, therefore, literally within the terms of this *section*. But for the purposes of the construction of this *section*, the personal representatives, or assignee, would probably be deemed in law to be parties to the agreement, by reason of their privity of title.

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7.—(1) The lien (*a*) shall attach upon the estate or interest (*b*) of the owner as defined by this Act in the erection, building, railway (*c*), land, wharf, pier, bulkhead, bridge, trestle-work, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit and ornamental trees and the appurtenances thereto, upon or in respect of which the work or service is performed (*d*), or the materials placed or furnished to be used, and the lands occupied thereby or enjoyed therewith (*e*).

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Property upon which lien shall attach.

(2) In cases where the estate or interest charged by the lien is leasehold the fee simple (*f*) may also, with the consent of the owner thereof, be subject to the said lien, provided such consent is testified by the signature of such owner (*g*) upon the claim of lien at the time of the registering thereof and duly verified.

Where estate charged is leasehold.

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Prior
mortgage.

(3) In case the land upon or in respect of which any work or service is performed, or upon or in respect of which materials are placed (*h*) or furnished to be used, is incumbered by a prior mortgage (*i*) or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien under this Act shall be entitled to rank upon such increased value (*j*) in priority to the mortgage or other charge. 59 V. c. 35, s. 6 (1-3).

Sub-contractors entitled to lien on land

(a) "**The lien.**" This includes not only the liens of those who contract directly with the "owner," but also liens of sub-contractors, between whom and the "owner" there is no privity of contract. The effect of the Act appears to be, to make each sub-contractor an assignee *pro tanto* of the original contractor through whom he claims.

Estate and interest bound by lien.

(b) "**upon the estate or interest.**" The lien attaches not absolutely against the land itself, but only against such estate and interest as the "owner,"—that is, the person for whom, directly or indirectly, the work is done or materials furnished, or any person claiming under him whose rights are acquired after the lien has attached,—has in the land: see *section 2*, notes (*c*), (*g*): *Phillips*, s. 72; and it has been held in the United States that it is only such estate or interest as the "owner" has at the time the lien attaches, which is bound by the lien; and that

where a person having only a limited estate, such as a lessee, enters into a contract whereby liens attach on his interest, his subsequent acquisition of the fee will not subject the latter estate also to the liens so created : see *Phillips*, s. 74 ; but see *Gaule v. Bilyeau*, 25 Penn. St. 521. In such a case there is said to be no estoppel to prevent an "owner" from setting up the after acquired estate, in opposition to liens created by him as lessee ; this, of course, is assuming that the landlord's interest has not been expressly bound : see above section 7, (2).

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Estate or interest subsequently acquired, how far bound by lien.

It seems probable, however, that under this Act it would be held that the lien binds not only the estate or interest the "owner" may have at the time the lien attaches, but also any other substantial estate or interest which he may acquire in the land so long as the lien remains in force : see *Gaskill v. Trainer*, 3 Cal. 334. Where the estate of an equitable owner of the fee was subject to liens, and he subsequently got in the legal estate, both estates were held to be bound : *Rollin v. Cross*, 45 N. Y. 766 ; *McGraw v. Godfrey*, 16 Abb. Pr. N. S. (N. Y.) 358. And an owner who becomes the purchaser of his own estate, which is subject to liens, at a sale for taxes, has been held to buy for the benefit of all parties interested, and has not been permitted to set up the tax title in opposition to the liens ; *McLaughlin v. Green*, 48 Miss. 175 ; and he cannot defeat a lien by procuring the legal title to be conveyed to his wife : *Hooker v. McGlone*, 42 Conn. 95.

Purchase of land at tax sale by "owner," effect of.

Where the seizin of the owner is a mere instantaneous seizin, it has been held that the lien does not attach as against the estate of his grantee. Thus, where a con-

Instantaneous seizin.

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tract was made with one not the owner of the land at the time, but who subsequently procured a deed of it, and simultaneously gave back a mortgage for the purchase money, the work being then in progress, it was held that the lien did not bind the interest of the mortgagee, for work done either before, or after, the deed : *Perkins v. Davis*, 120 Mass. 408 ; *Ettridge v. Bassett*, 136 Mass. 314 ; see also *Thaxter v. Williams*, 31 Mass. 49 ; *Hayes v. Fessenden*, 106 Mass. 228 ; *Guy v. Carriere*, 5 Cal. 511 ; *Phillips*, s. 246 ; but see *post*, section 13 (2).

Right of pre-emption.

A right of preëmption may be bound by a lien : *Turney v. Saunders*, 5 Ill. 527 ; *Blight v. Ray*, 23 O. R.

Lessee cannot, by surrender of term, defeat lien.

415. A lessee whose interest is subject to a lien, cannot defeat the lien by a voluntary surrender of the term, and, if the lessor do not discharge the lien, the lessee's interest may be sold under a judgment to enforce the lien, and the lessor has been held to be bound to accept another tenant : *Dobschuets v. Holliday*, 82 Ill. 371.

Only interest bound by lien is saleable.

It is only the estate or interest actually affected by the lien, which can be sold for the satisfaction of the lien : *Graham v. Williams*, 9 O. R. 458 ; *Phillips*, s. 186, *et seq.* ; *Ruggles v. Blank*, 15 Ill. App. 436.

True owner when estopped from denying title in third party.

The true owner of the estate may be bound by estoppel, when he stands by, and allows another to assume to deal as the owner of the land : see *Phillips*, s. 75 ; *Higgins v. Ferguson*, 14 Ill. 269 ; *Donaldson v. Holmes*, 23 Ill. 85 ; and see *Blight v. Ray*, 23 O. R. 415.

Devise to pay off lien subject to Mortmain Act

The lien is an interest in land, and a bequest to pay off a mechanic's lien on a church is therefore subject to the Statute of Mortmain : *Stewart v. Gesner*, 29 Gr. 329.

(c) "**Railway.**" The solution of the very difficult question which must inevitably arise, whether the Ontario Legislature has any power at all to pass such a law as the present one so as to bind the property of railways which are not within its legislative control, must rest with the Courts of Law. It has been held that the B. C. Mechanics' Lien Act does not apply to such railways: *Larsen v. Nelson & Fort S. Ry.* 4 B. C. R., 151. The B. N. A. Act, s. 92, s-s. 10, a, and c, expressly negative the power of the Provincial Legislature to make laws "*in relation to*," *inter alia*, railways connecting adjoining Provinces, or extending beyond the limits of the Province,—or such works as although wholly situate within the Province, are before or after execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. By B. N. A. Act, s. 92, sub-sect. 13, the Provincial Legislature, however, has power to make laws in relation to property and civil rights in the Province. This statute may be said to be an Act "*in relation to*" railways, and also an Act in regard to property and civil rights; while the sub-sect. 13, above referred to, appears to authorize the Legislature to pass the Act, sub-sect. 10, a, c, appears to forbid it, in so far as it is in relation to railways under Dominion control. How then is this apparent conflict to be reconciled? A somewhat similar question arose in *Tennant v. Union Bank* (1894) A. C. 31; 69 L. T. 774, and it was there held by the Privy Council, that where the Dominion has an exclusive right of legislation as to a particular subject-matter (in that case "Banking"), the right of a Province to legislate as regards property and civil rights does not

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How far Act
binding on
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enable it to legislate so as to affect, override, or supplement, the provisions of the Dominion Act respecting that particular subject-matter, or to affect the civil rights of property therein involved; and see also *Cushing v. Dupuy*, 5 App. Cas., 409; *Colé v. Watson*, 2 Cart. 343; *Leprohon v. Ottawa*, 1 Cart. 592; *Evans v. Hudon*, 2 Cart. 346. These decisions of the Privy Council seem rather to lead to the conclusion that the Provincial power of legislation regarding property and civil rights within the Province will not enable a Province to legislate so as to bind even property and civil rights in respect of any subject-matter which is expressly excluded from its legislative control, (see concluding clause of s. 91, B. N. A. Act), and therefore that the present Act cannot affect railways under Dominion control. It must be confessed it is difficult to draw any certain conclusion from the decided cases bearing on the subject. The Ontario Statute 44 Vict. c. 22 (O.) providing for the packing of railway frogs, though by section 2 professing to "apply to every railway and Railway Company in respect of which the Legislature of Ontario has authority to enact such provision respectively," was held, nevertheless, to apply only to railways under the control of the Legislature of Ontario: *Monkhouse v. Grand Trunk Ry.*, 8 A. R. 637; 3 Cart. 289.

On the other hand there is the decision of the Supreme Court in *Canada Southern v. Jackson*, 17 S. C. R. 316, that the Ontario Statute "*The Workmen's Compensation for Injuries Act*," does apply to Dominion Railways.

In the course of the argument of the case of the *Attorney-General of Ontario v. Attorney-General of Can-*

ada (1894) A. C. 189, Lord Watson remarked : "The view I have rather taken of it is this, that within the area given to the Dominion Parliament by section 91, there is a legislative area part of which is their own exclusively, but that area may include in addition certain ancillary provisions which touch and trench upon the Provincial law, and as long as there are enactments in that part of the area it would exclude the right of the Province to legislate to the effect of destroying—derogating from—their enactments. It would take away their power as effectually as though it belonged to the primary area. If there had been no legislation then my impression was that, within what I call the secondary area, the Provincial Parliaments are free to legislate." Section 7.

If this is to be the test for determining the question, then it may be said that in the absence of any Dominion Statute dealing with the question of the recovery of debts due by railway companies under the Dominion control, this enactment is valid and binding on such railways ; but liable at any time to be superseded by any Dominion legislation affecting the question.

The question whether in any case liens can be enforced as against railways in active operation, so as to interfere with the use of their land actually required for the working of the railway, is discussed in note to *section 4, ante*, p. 30.

(d) "upon or in respect of which the work or service is performed." The lien will not extend to any land or building except that upon, or in respect of which, the work is done or materials furnished. It has Lien only binds land on which work done.

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been held that there can be no lien on either land or building, for the work and labour, or materials, expended in removing a building : *Trask v. Searle*, 121 Mass. 229.

Contract to build separate buildings on distinct parcels, effect of.

When a mechanic contracts with one person for the erection of two separate buildings under two distinct contracts, each parcel of land is only liable for the building erected thereon, and the mechanic is not entitled to register a claim against both parcels for one gross sum in respect of the two ; if he include both parcels in one claim he must at least show how much is claimed against each parcel separately : *Currier v. Friedrich*, 22 Gr. 243 ; and see *Shaw v. Thompson*, 105 Mass. 345 ; *Oldfield v. Barbour*, 12 P. R. 554.

Contract to build for one price on land of different owners.

In the United States it has been held, that where labour is performed, and materials are furnished, on the land of different owners, under an entire contract, without stating separate prices, there can be no lien on any part of the land for any part of the price : *Rathbun v. Hayford*, 87 Mass. 406 ; and see *Childs v. Anderson*, 128 Mass. 108. So also it has been held that there is no lien where the labour in respect of which it was claimed was performed partly on land which the employer owned, and partly upon land to which he had no title : *Stevens v. Lincoln*, 114 Mass. 476 ; *McGuinness v. Boyle*, 123 Mass. 570 ; and the wording of this Act would appear to justify a similar construction, Inasmuch as the lien is to be a charge on the interest of the "owner" in the building, erection or mine *upon or in respect of which the work is done* or the materials or machinery placed or furnished *and the land occupied thereby or enjoyed therewith* : upon any other construc-

Work done partly on land belonging to "owner," and partly on land to which he has no title, effect of.

tion, the lien for the work done on the land the employer did not own, would be thrown on the land which he did own, but upon which the work had not been done,—which appears to be unwarranted by the terms of this *section*.

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(e) “**and the lands occupied thereby or enjoyed therewith**” This includes that extent of ground, and no more, which, under all the circumstances, is reasonably proper and necessary for the enjoyment of the particular building. It is said that in cities the building lot attached to the house is unquestionably intended, and that in country villages, though lots are generally larger, yet they are equally necessary for the enjoyment of the various structures erected upon them, and that an acre in such villages is not unreasonable: see *Phillips*, s. 200. And where two adjacent town lots are used together, without an actual division between them, as a mill lot, a part of the buildings and machinery being upon one, and a part upon the other, the lien extends to both lots: *Ib.* Where the building in respect of which a lien exists is removed to another lot, the lien will not attach upon such other lot: *Underhill v. Corwin*, 15 Ill. 556.

Extent of land
liable to lien.

(f) “**the fee simple.**” The provisions of this *section* must be strictly complied with, wherever it is sought to charge the fee with a lien arising upon a contract made with a lessee. The mere fact that the lessee may have a right of purchasing the fee, and that the landlord knows that work is being done, or materials furnished, upon the demised premises, at the request of the lessee,

Charging
interest of
lessor.

Section 7. does not make the landlord's estate liable to be charged even though in certain contingencies the latter may possibly become entitled to the benefit of erections or improvements so made: see *Graham v. Williams*, 8 O. R. 478; 9 O. R. 458; *Fleck v. Jeffrey*, 10 Man. 514.

Signature of lessor, to claim for lien. (g) "**signature of such owner.**" The signature of the landlord upon the claim of lien registered, is essential to a charge upon his estate, for any liability upon a contract made with his lessee. It will be seen by *section* 23 that it is not necessary in every case to register a lien. Where a suit is brought within the period prescribed by that *section*, and a certificate of *lis pendens* is registered, the previous registration of the lien is dispensed with altogether; but whenever a landlord's estate is sought to be charged under this *section*, it is essential that the lien should be registered before suit. The statute is not very clear, whether the lien against the landlord's estate is to rank as from the date when the lien attached against the lessee's interest, or whether it dates only from the time of the registration of the claim. As between the lien-holder, and a purchaser or mortgagee for value from the landlord without notice of the lien, equity would seem to require that the lien should only date from the time of registration of the claim, bearing the landlord's signature as required by this *section*.

Incorporation of work or materials, essential to permanent improvement. (h) "**materials are placed.**" Although, as we have seen, a lien may in some cases exist for materials furnished "to be used" in the construction or repair of a building, although such materials may not be actually incorporated: see *ante*, p. 27, note (e), yet under this

section, it is clear that there must be an actual incorporation of the material, in order to give a lien-holder any prior claim as against a prior mortgagee, because it is of the very essence of this provision in favour of the lien-holder, that the value of the land is increased by the work done, and materials furnished, in respect of which the lien is claimed.

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(i) “**prior mortgage.**” In R. S. O. (1877) c. 120, s. 7, from which this *sub-section* was originally derived, ^{Prior mortgage, meaning of.} the words were “encumbered by a mortgage or other charge existing, or created, before the commencement of the work or the placing of the materials or machinery upon the land”; the words “prior mortgage” are no doubt intended to be equivalent for the words used in the Revised Statutes, 1877. The expression “prior mortgage,” seems, however, to open the door to a conflict of opinion, as to what are to be regarded as prior mortgages. A question may arise whether a mortgage made after a contract has been entered into, but before there has been any part performance of it, is, or is not, a “prior mortgage”; a question which could not have arisen under the wording of the original section: see *section 2*, s.-s. 3 and note (g) *ante* p. 12. After the contract, and before commencement of its performance, the contractor has such an inchoate right of lien that he is authorized to register a claim therefor: see *section 22*, which on the subsequent performance of the work will be complete.

As against a registered lien, a mortgage or other charge, in order to have priority over the lien, must have been registered previously to the lien, or the lien-

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holder must have had actual notice of such mortgage before acquiring his lien,* otherwise the registered lienholder would be entitled to priority, to the full amount of his lien; see *The Registry Act*, s. 87, and see *post*, section 21. When a mortgage is given to secure further advances, and the mortgagee makes further advances subsequently to the acquisition of a right of lien under this Act, but before such lien has been registered, and before the mortgagee has actual notice of the lien, the mortgagee is entitled to priority over the lienholder in respect to such further advances: *Richards v. Chamberlain*, 25 Gr. 402; *Re Craig*, 3 C. L. T. 401; *Cook v. Belshaw*, 23 O. R. 545; *Pierce v. Canada Permanent Loan & Saving Co.*, 25 O. R. 671; and see R. S. O., c. 136, s. 99.

When a mortgage subsequent to a lien in point of date acquires priority over the lien by virtue of prior registration, that is not "a prior mortgage" within the meaning of this section: *Cook v. Belshaw*, *supra*: and see 26 C. L. J. 578, where the point is discussed.

Where a mortgagee claiming under a mortgage which is subsequent to a lien applies part of the advance for which the mortgage is given, in paying off a mortgage which was prior to the lien, he is entitled to stand in the position of the prior mortgagee for the money so paid to him: see *Locke v. Locke*, 32 C. L. J. 332.

*It may be a question whether actual notice at any time before registering the lien would not be sufficient to postpone the lienholder: see R. S. O. c. 136, s. 87; *Rose v. Peterkin*, 13 S. C. R. 710, per Strong, J.; it was held that it would in *West v. Sinclair*, 28 C. L. J. 119.

(j) "**upon such increased value.**" It will be observed that the lien-holder is not entitled to priority for the full value of the improvements effected by him, or by means of his labour or materials, but merely in respect of the amount, if any, by which the selling value of the property has been increased by such improvements. This must be largely a question of opinion, and the onus will lie upon the lien-holder claiming priority to a prior mortgagee, to establish by what amount the selling value has been increased by the improvements in respect of which he claims a lien. Where improvements have been made by several parties each is entitled to share *pro rata* in the increased selling value, in the proportion which the value of the work done, or materials furnished by him, bears to the value of the whole improvements: *Broughton v. Smallpiece*, 25 Gr. 290; S. C. before the Master, 7 P. R. 270; and see *Bank of Montreal v. Haffner*, 3 O. R. 183. In *Broughton v. Smallpiece* it was held that where the property is insufficient for the payment of the mortgage debt, the lien-holder is bound to credit as against the sum in respect of which he is entitled to priority, all payments made on account of his claim; and that all payments made by the "owner" in reduction, or satisfaction, of the claims of lien-holders, will be deemed to be made in case of the mortgagee. Under the ordinary rule, in regard to the application of payments, the creditor, in the absence of an express appropriation by the debtor to the contrary, would be entitled to apply money received from the debtor, in discharge of that claim for which he holds the least security: see *Armour v. Carruthers*, 4 U. C. L. J. 210; *Fraser v. Locie*, 10 Gr. 207; and it might, with some reason, be

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Extent of lien
as against
prior mort-
gagee.Lien-holders
to share *pro*,
rata, as
regards prior
mortgages.Payments by
"owner," how
to be credited
as between
mortgagee
and lien-
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urged that a lien-holder, receiving payments from his debtor generally on account, is entitled to apply them first in discharge of that part of his claim which is practically unsecured ; and when such appropriation by the lien-holder has been actually made, it is possible the rule laid down in *Broughton v. Smallpiece* would not apply.

Unless the work done or materials furnished have actually increased the selling value, there can be no lien as against a prior mortgage under this *section*. Where, therefore, a scheme for the improvement of mortgaged property is commenced, but is not fully carried out ; unless the work actually done and materials provided have actually increased the selling value of the property, the lien cannot take priority over the mortgage, notwithstanding that, without default on the lien-holder's part, the whole scheme, which would have increased the selling value if completed, has not been carried out : *Kennedy v. Haddon*, 19 O. R. 240.

It would seem that although the increased "selling value" may be approximately ascertained without a sale by consent of the parties, yet until a sale has actually taken place, it cannot really be definitely fixed. In a case which arose under the former Act in force in 1895, the selling value was fixed by the Master, and then, after it had been so fixed, and pending the proceedings in the Master's Office, the premises were destroyed by fire, and the Court held that any lien which the lien-holder might have had in respect of such increased selling value was at an end, and under that Act the lien-holder had no claim against any insurance money received by the mort-

gatee in respect of the building so destroyed : *Patrick v. Walbourne*, 27 O. R. 221 ; but under the present Act the insurance money is to stand in the place of a building so destroyed : see *post*, section 8.

Where relief is claimed against a mortgagee under this section, the mortgagee is a necessary party to the action, and the statement of claim should distinctly allege that the mortgage is prior to the lien. Where a bill of complaint under the former practice in Chancery stated the date of the mortgage as "on or about," etc., it was held insufficient to found a decree against the mortgagees, notwithstanding that they had suffered the bill to be taken *pro confesso* against them : *Douglas v. Chamberlain*, 25 Gr. 288, and see *Richards v. Chamberlain*, *Ib.* 402. The action against the mortgagee must be commenced within the period limited by sections 23, 24, 25. Thus, where a lien-holder had within the proper time commenced proceedings against the "owner" and had obtained a decree against him to enforce the lien, it was held he could not afterwards file another bill, to obtain relief as against a prior mortgagee under this section, after the time limited by sections 23-25 for bringing a suit had expired : *Bank of Montreal v. Haffner*, 29 Gr. 319 ; 10 A. R. 592 ; S. C. *sub nom.* *Bank of Montreal v. Worswick*, Cass. Dig. 289 ; and neither, it would appear, could mortgagees be made parties by amendment after the time has elapsed for commencing a suit under sections 23-25, even though the action might originally have been commenced in time : see *Shaw v. Cunningham*, 12 Gr. 101 ; *McDonald v. Wright*, 14 Gr. 284 ; but see *Cole v. Hall*, 12 P. R. 584 ; 13 P. R. 100.

Section 7.

Parties to suit to enforce lien as against prior mortgagee.

Time limited for bringing action against prior mortgagee.

Section 7.

Landlord
whose tenant
has right of
purchase, not
a mortgagee.

A landlord, who has leased with a right to the tenant to become the purchaser, cannot be treated as a mortgagee under this section: *Graham v. Williams*, 9 O. R. 458; but see *Blight v. Ray*, 23 O. R. 415. Where there is an actual agreement for the purchase, but no conveyance has been made by the vendor, for the purpose of this Act the purchaser is to be deemed a mortgagee and the purchaser a mortgagor: see *post*, section 13 s.-s. 2 and notes.

Under 56 Vict. c. 24, s. 9, a mortgagee might have been restrained from proceeding to sell or foreclose, pending a suit to enforce a mechanic's lien against the mortgaged property, on being served with notice, but that Act has been repealed: see 59 Vict. c. 35 s. 52, and that particular provision of it has not been embodied in this Act.

Section 8.

Application
of insurance
when lien
attaches.

8. Where any of the property upon which a lien is given by this Act is wholly or partly destroyed by fire (*a*), any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee shall take the place of the property so destroyed, and shall be subject to the claims of all persons for liens to the same extent (*b*) as if such moneys were realized by a sale of such property in an action to enforce a lien. 59 V. c. 35, s. 7.

(*a*) "**destroyed by fire.**" The only loss here contemplated is one arising from fire. Insurance money

received by reason of the destruction of the property by any other cause does not seem to be within this *section*. Section 8.

This *section* is new, and extends the right of lien to fire insurance moneys, no matter, it would seem, by whom the insurance may have been effected. Where the insurance money has been received by a mortgagee, if his mortgage is subsequent to the lien, the lien-holder would seem to be entitled to a prior lien against the money. If, on the other hand, it be received by a mortgagee who is prior within the meaning of *section* 7, s.-s. 3, the right of the lien-holder would then seem to depend on whether he can establish in evidence that at the time of the fire the selling value of the property had been increased by the improvements effected by the lien-holder for which the lien is claimed; and the lien-holder would appear to be intended to have a prior claim to the mortgagee on so much of the insurance money as should be equal to such increased value, if any.

Prior to this *section*, in the event of the destruction by fire of the buildings in respect of which a lien on the increased selling value existed, the lien-holder had no right to resort to the insurance money, and his lien on the land was also defeated: *Patrick v. Walbourne*, 27 O. R. 22.

(b) "**to the same extent.**" The scope of the *section* is to put the insurance money realized upon a destruction of the property by fire in the same position as purchase money realized by a sale of the property. It must be remembered, however, that in addition to the insurance

Section 7. money, the land itself will remain to be realized, and it is probably not intended that the insurance money is to stand as the whole value of the property subject to the lien, but merely for that part of it which has been destroyed, and a lien-holder will not be precluded by this *section* from enforcing his lien against the land as well as the insurance money.

Section 9.
Limit of
amount of
lien.

9. Save as herein provided (a) the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor (b). 59 V. c. 35, s. 8.

(a) "**Save as herein provided.**" See *sections* 11, 12, and *section* 14, s.-ss. (2), (3), (4), *post*, and notes.

Sub-contractors' liens can not exceed what is due by "owner," to "contractor."

(b) "**payable by the owner to the contractor.**" No matter what may be the aggregate amount of the claims of a "contractor" and his "sub-contractors," they cannot, in any event, (except in the case of liens for wages under *section* 14 (1) : and except, perhaps, as regards the percentage required to be retained by the owner under *section* 10 (1) : see *Russell v. French*, 28 O. R., 215), be enforced against the land. for any sum beyond what is due from the "owner" to the "contractor," unless the "owner" has made payments to the contractor in order to defeat or impair the claim of the lien holders (see *section* 15), or within the prescribed time has made payments exceeding the prescribed percentage of the contract price (see *section* 11), and even then only to the extent of the sum improperly paid : *Briggs v. Lee*, 27 Gr. 464.

Where the contractor's right to recover from the owner is dependent on some condition which he is unable to perform, the right of himself and his sub-contractors to enforce liens may be thereby defeated: see *ante*, section 4, note (c), p. 22.

Section 9

10. Save as herein provided (a) where the lien is claimed by any other person than the contractor, the amount which may be claimed in respect thereof shall be limited to the amount (b) owing to the contractor or sub-contractor or other person for whom the work or service has been done or the materials have been placed or furnished. 59 V. c. 35, s. 9.

Section 10.

Limit of lien when claimed by some other than contractor.

(a) "**Save as herein provided**" See *post*, sections 11, 12, and 14.

(b) "**limited to the amount.**" No matter what sum may be the aggregate of the claims of "contractor" and "sub-contractors," they cannot ordinarily be enforced against the land, for any sum beyond what is due from the "owner" to the "contractor,"—unless the "owner" has made payments to the "contractor," in order to defeat or impair the claim of other lien-holders: see section 15), or within thirty days after the completion of the work, in respect of which a lien exists, has made payments exceeding the 80 or 85 per cent. of the price of the work or material actually done or furnished (see section 11), and even then only to the extent of such

Ordinarily the claims of sub-contractors against the land, cannot exceed amount due by "owner," to "contractor."

Exception to rule.

Section 10.

excess : *Briggs v. Lee*, 27 Gr. 464. If no payment is under the contract, to be made to the contractor till the work is completed by him, and it never is completed by him, nothing will be due to him : *Appleby v. Myers*, L. R. 2 C. P. 651 ; *Sherlock v. Powell*, (Q. B. Div. Court, 30th December, 1898); and consequently it would seem that in such a case nothing could be recovered by any sub-contractor under him, except those entitled to wages, who notwithstanding the non-completion of the contract, appear to be entitled to a lien for wages under *section 14* (4). It has also been held that as regards the percentage required to be retained by the owner, sub-contractors generally, are entitled to enforce their liens notwithstanding the contractor fails to complete his contract and to earn the percentage retained: *Russell v. French*, 28 O. R. 215.

As to the effect of payments made under the contract upon the right of lien : see *section 11*.

The account cannot be taken of what is due to a contractor for the purpose of enforcing the liens of sub-contractors under him, unless the parties liable on the contract are before the court : *Wood v. Stringer*, 20 O. R. 148.

Section 11.

Percentage to be deducted and retained by owner for thirty days.

11.—(1) In all cases the person primarily liable upon any contract (a) under or by virtue of which a lien may arise under the provisions of this Act shall, as the work is done or materials are furnished under the contract, deduct from any payments to be made by him in respect of the contract, and retain for

a period of thirty days after the completion or abandonment of the contract twenty per cent. of the value of the work, service and materials actually done, placed or furnished (*b*) as mentioned in section 4 of this Act, and such values shall be calculated on the basis of the price to be paid for the whole contract ;
Provided that where a contract exceeds \$15,000 the amount to be retained shall be fifteen per cent. instead of twenty per cent. and the liens created by this Act shall be a charge (*c*) upon the amounts directed to be retained by this section in favour of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable. 60 V. c. 24, s. 2 (1).

Section 11.

Proviso.

(2) All payments up to eighty per cent. (*d*) (or eighty-five per cent. where the contract price exceeds \$15,000) of such value (*e*) made in good faith (*f*) by an owner to a contractor, or by a contractor to a sub contractor, or by one sub-contractor to another sub-contractor before notice in writing (*g*) of such lien given by the person claiming the lien to the owner, contractor or the sub-contractor,

Payments
made in good
faith without
notice of lien.

Section 11. as the case may be, shall operate as a discharge *pro tanto* of the lien created by this Act (*n*). 59 V. c. 35, s. 10 (2).

(3) Payment of the percentage required to be retained under sub-section 1 may be validly made so as to discharge all liens or charges under this Act in respect thereof after the expiration of the said period of thirty days mentioned in sub-section 1 unless in the meantime proceedings shall have been commenced (*i*) under this Act to enforce any lien or charge against such percentage as provided by sections 23 and 24 of this Act. 60 V. c. 24, s. 2 (2).

(a) "In all cases the person primarily liable upon any contract." This provision is introduced for the benefit of sub contractors. It applies not only to the owner, but to contractors and all others entering into sub contracts under which liens may arise under the Act. The clause is imperative and any person neglecting to observe its provisions may make himself liable to pay over again to sub-contractors moneys paid in violation thereof. How far this statutory obligation to make the deduction of the percentage here mentioned, could be set up as a bar to an action on an express contract to pay at an earlier date, is doubtful. It would be prudent for persons entering into building contracts under which a lien under the Act may arise, so to stipulate in regard

to the payments to be made thereunder, that no conflict shall arise between the terms of the contract, and this statutory obligation to retain the percentage required to be retained by them under this *section*.

Section 11.

(b) "**actually done, placed or furnished.**" This *section* as now worded differs materially from the similar provisions in the former Mechanics' Lien Acts. Under the former Acts (see R. S. O. (1887), c. 126, s. 7; 53 Vict. c. 38, s. 1) the percentage was to be retained on "the price to be paid to the contractor."

As the law formerly stood it was not necessary for the owner to reserve a percentage of the price of the work done from day to day, so as always to have in hand a percentage of the contract price of the work actually done. He was protected if his payments to the contractor did not exceed the stated percentage of the whole contract price; and if the contractor, by his default, never earned the percentage retained, there was no charge upon it in favour of any of his sub-contractors: *Briggs v. Lee*, 27 Gr. 464; *Goddard v. Coulson*, 10 App. R. 1; *Schultz v. Hay*, 62 Ill. 157; *Truax v. Dixon*, 17 O. R. 366; *Reggin v. Manes*, 22 O. R. 443; *Re Sear & Woods*, 23 O. R. 474; see, however, *Re Cornish*, 6 O. R. 259.

This *section*, on the other hand, requires every owner, contractor, and sub-contractor, under whom a lien may arise under the Act, to retain the percentage mentioned of the value of the work and materials actually done or furnished; they can not, therefore, safely pay their contractors in full for work or materials

Section 11.

actually done or furnished up to eighty or eighty-five per cent., as the case may be, of the total contract price ; but they must from time to time as the work progresses, retain the fifteen or twenty per cent. (as the case may be) of the price of the work or materials from time to time actually done or furnished, so as always to have on hand for the required period, for the benefit of sub-contractors, at least fifteen or twenty per cent. of the price which has been actually earned.

Sub-contractors entitled to charge on percentage required to be retained.

(c) "**shall be a charge.**" The charge created by this *section* is in favour of "sub-contractors" only, and enables them to intercept money due from the "owner" to the "contractor," or from a contractor, or sub-contractor, to any sub contractor under whom they claim. Where there are several sub-contractors, each, according to his class, would be entitled to a *pro rata* share of the percentage required to be retained on which a charge is here given ; except those entitled to liens for wages for thirty days or less. This latter class of lien-holders are entitled to priority over all other lien-holders in respect of the percentage required to be retained under *section* 11 : see *section* 14 (1). Formerly, however, where a contractor made default, and never earned the percentage retained, a sub-contractor under him had no lien against the "owner" in respect of such percentage : *Goddard v. Coulson*, 10 A. R. 1 ; *Harrington v. Saunders*, 23 C. L. J. 48 ; 7 C. L. T. Occ. N. 88 ; *Truax v. Dixon*, 17 O. R. 366 ; *Re Sear & Woods*, 23 O. R. 474 ; but this is no longer the law in the case of a lien for wages ; see

Preferential charge of liens for wages.

section 14 (2); nor in the case of other liens, it being held to be the intention of the Act that the percentage required to be retained is to be liable for the claims of sub-contractors, even though the contractor, by his default, fails to earn it: *Russell v. French*, 28 O. R. 215. Section 11.

It is only where a lien exists under the Act, that any charge upon the percentage of the price can be claimed: *Edmonds v. Tiernan*, 21 S. C. R. 406. Thus, where it was held that the mechanic doing work on a public school building was not entitled to any lien on the land, it was also held that he had no lien or charge upon the contract price: *Robb v. School Board of Woodstock*, per Proudfoot, V. C., at Woodstock, April, 1880; and see *Briggs v. Lee*, 27 Gr. 464; *Forhan v. Lalonde*, 27 Gr. 600; *Edmonds v. Tiernan*, *supra*; and see *ante* p. 29, note (g). No charge on 20% or 15% of price, except there be a valid lien.

The charge must be enforced by the commencement of proceedings within in the time limited by sections 23, 24 *post*, or it will be lost; see *sub-sect. 3, supra*, p. 62.

(d) "all payments up to eighty per cent., &c." Payments by owner, when valid.
This *sub-section* validates payments up to eighty, (or eighty-five per cent. where the contract price exceeds \$15,000); *sub section* (3) makes provision respecting the payment of the fifteen or twenty per cent. directed to be retained under the preceding *sub section* (1).

Payments by the owner exceeding the eighty or eighty-five per cent. (as the case may be) before the lapse of the 30 days, even if made pursuant to the contract, are not protected as against the charge of sub-contractors. Where the contract is not completed by the origi-

Section 11. — nal contractor, and he is not entitled to be paid the percentage required to be retained, though it was formerly held that a sub-contractor claiming under him had no charge upon such percentage as against the owner: *Briggs v. Lee*, 27 Gr. 464; *Re Sear & Woods*, 23 O. R. 474; *Schultz v. Hay*, 62 Ill. 157; yet it has now been held that he has under this Act: *Russell v. French*, 28 O. R. 215. As to claims for wages see *post*, sect. 14, note (d).

This section not only protects payments made to the contractor himself, but also payments made by the owner at the contractor's request to others, and would include the giving of a promissory note to a third person at the contractor's request: *Jennings v. Willis*, 22 O. R. 439; also payments made by an owner for goods supplied on his own personal credit, which the contractor was bound to finish but had neglected to do: *McBean v. Kinnear*, 23 O. R. 313; but payments to an assignee of a contractor stand on the same footing as payments to the contractor himself: *Ib.*

Payments made by an owner after notice of a lien are only invalid, where, if not made, they would have been liable for the satisfaction of the lien-holder giving the notice: *Ib.*

(e) "of such value." The value here referred to is the value of the work and materials actually done or furnished.

Payments by
"owner"
before notice
of lien of sub-
contractor

(f) "made in good faith." The registration of a lien of a sub-contractor will not invalidate payments subsequently made *bona fide* by an owner, on whom no written notice of lien has been served, provided such

payments do not in the aggregate exceed the 80 or 85 per cent. to be retained under *section 11* : see *Phillips*, s. 63 : and formerly not even though such payments exceeded the full amount due to a contractor, who subsequently abandoned his contract : *Briggs v. Lee*, 27 Gr. 464 : but that case probably cannot arise under this Act : see *supra* notes (a) and (b), to this *section*.

Section 11.

(g) "**notice in writing**" The notice must be given by the sub-contractor claiming a lien. The object of this *section* is primarily, to define under what circumstances payments by an "owner" to his "contractor" may be validly made, so as to be good against the sub-contractors claiming under such contractor, or any of his sub-contractors. For forms of notice see Appendix.

The reasonableness of this provision is apparent, for if registration of the lien intercepted the right to make payments, it would be incumbent on every "owner," "contractor" or "sub-contractor," not only to search in the registry office for liens every time he might wish to make a payment on his contract, but all such payments would have to be made in the registry office, for fear that, between the search and the payment, a lien might be registered. Only payments made in good faith are protected. Payments made for the purpose of defeating or impairing a claim to a lien existing or arising under the Act, would be void as against the person entitled to such lien : see *section 15, post*. In the absence of any decision on the subject, it would seem probable that payments to a contractor made in advance, or before they were due under the contract, or payment to one sub-contractor in full and to another nothing as the

Section 11. partiality of the payer might determine, would be held not to be *bona fide* as against other lien-holders : see *Phillips*, ss. 62c, 62g, 62h.

The percentage required to be retained under *sub-section 1, supra*, must be retained, whether notice be served or not by any sub-contractor.

(h) "**lien created by this Act.**" That is, the lien on the estate or interest of the "owner" in the land upon which the work or materials have been expended, and this includes not only the lien of the "contractor," but also the liens of all sub-contractors claiming under such "contractor."

(i) "**unless in the meantime proceedings shall have been commenced.**" The meaning of this provision would seem to be that the primary debtor is precluded, except with the consent of all parties interested, from paying the percentage over to any person within the 30 days referred to in *sub-section 1* : and in the absence of such consent proceedings, to enforce the charge on the percentage must be commenced within the times limited by *sections 23 and 24, post*. It is probable that proceedings by one lien-holder claiming a charge on the fund, in which others claiming on the same fund could enforce their claims, would be a sufficient compliance with this *sub-section*, and that it would not be necessary for every sub-contractor claiming a charge to commence separate proceedings in his own name.

The scheme of this *section* seems to be that the owner shall retain in his hands the required percentage on each contract he makes with a contractor, and that each con-

tractor and every sub-contractor, making any sub-contract for the performance of any of the work, must each, as regards his own contract, also retain the required percentage. Thus, assume that A the owner enters into a contract with B to build a house for \$5,000, and B sub-lets part of the work to C for \$1,000, and another part to D. for \$500, and D again sub-lets part of his work to E for \$100; then, under this *section*, A must retain \$1,000 under his contract, B must retain under his contract with C \$200, and under his contract with D \$100; and D must retain under his contract with E \$20; and the amounts thus retained are subject to the charges in favour of the various sub-contractors claiming under B, C, and D, respectively.

E.g. the \$1,000 required to be retained by the owner is subject to a charge in favour of C for \$200, of D for \$80, and of E for \$20. If D had not sub-let part of his contract, he would have been entitled to a charge on the percentage in the hands of the owner for \$100, instead of \$80.

It may be here observed that the percentage is required to be retained not in each case for thirty days after the completion of the entire work to be done for the owner, but only for thirty days after the completion or abandonment of the particular contract under which the money is payable, for it does not appear to be the intention of this *section* that every sub-contract shall be kept open until the entire work is completed. *E.g.* to return to the above illustration, the percentage to be retained by B need not be retained longer than thirty days after the contract to be performed by C and

Section 11. D respectively shall have been completed or abandoned. As regards the owner, of course the required percentage to be retained by him on each contract with each contractor with whom he primarily contracts must be retained for the thirty days after each of such contracts shall have been respectively completed or abandoned; but he is not required to retain any percentage due contractor B, to await the completion or abandonment of a contract with contractor Z. The sub-contractors under contractor B have no claim on the percentage retained out of the contract price payable to contractor Z, nor *vice versa*. Each sub-contractor's rights in the percentage are confined to the percentage payable on the owner's contract with the particular contractor under whom the sub-contractor's lien or charge is derived.

Section 12.

Payments
made direct
by owner to
persons en-
titled to lien.

12. In case an owner or contractor chooses to make payments to any persons referred to in section 4 of this Act for or on account of any debts justly due to them for work or service done or for materials placed or furnished to be used as therein mentioned, and shall within three days afterwards give, by letter or otherwise, written notice of such payment to the contractor or his agent, or to the sub-contractor or his agent, as the case may be, such payments shall, as between the owner and the contractor, or as between the contractor and the sub-contractor, as the case

may be, be deemed to be payments to the contractor or sub-contractor, as the case may be, on his contract generally, but not so as to affect the percentage to be retained by the owner, as provided by section 11 of this Act (*a*). 59 V. c. 35, s. 11.

(*a*) This *section* was an altogether new provision in the Act of 1896. Its exact import is somewhat difficult to be understood. It is probably intended to validate payments made by an owner to sub-contractors, or by contractors or other sub-contractors, to persons to whom they are not directly liable. This would appear to be so from the fact that a notice in writing is required to be given to the "contractor or his agent," or to the "sub-contractor or his agent," which, of course, would be unnecessary if the payments referred to were those made to the person to whom the payer was directly liable. For instance, where payments are made by an owner to his contractor, notice of such payments cannot be required to be given to the contractor to whom the payment is made, in order to validate them: it can only be where the owner makes payment to sub-contractors that the notice thereof is required under this *section* to be given to the contractor; and in the same way, where a contractor pays his immediate sub-contractor notice is unnecessary, but where he pays a sub-contractor under such sub-contractor, or any person to whom he is not directly liable, it is then that the notice is required in order to make the payment a valid payment as between himself and the person to

Section 12. — whom he is directly liable, as a *pro tanto* discharge of that liability. The concluding words of the *section* show that even payments to sub-contractors cannot be made by an owner so as to affect his retention of the percentage required to be retained by him under the preceding *section*.

In order to validate the payment as against the primary creditor the amount paid must be "justly due" to the payee. Persons making payments to sub-contractors under this *section* assume the responsibility of proving, if it be disputed, that the amount so paid was 'justly due.'

Section 13.
Priority of
lien.

13.—(1) The lien created by this Act shall have priority (a) over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage (b) after notice in writing of such lien to the person making such payments or after registration of such lien as hereinafter provided.

Agreements
for purchase
where part of
purchase money unpaid.

(2) In case of an agreement (c) for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance made to the purchaser, the purchaser shall, for the purposes of this Act and within the meaning

thereof, be deemed a mortgagor and the seller a mortgagee (*d*). Section 13.

(3) Excepting where it is otherwise declared (*e*) by this Act, no person entitled to a lien on any property, or to a charge on any moneys under this Act shall be entitled to any priority or preference over another person of the same class entitled to a lien or charge on such property or moneys under this Act, and each class of lien holders, except where it is otherwise declared by this Act, shall rank *pari passu* (*f*) for their several amounts, and the proceeds of any sale shall, subject as aforesaid, be distributed among them *pro rata* according to their several classes and rights. 59 V. c. 35, s. 12. Priority among lien-holders.

(a) “**shall have priority.**” The priority conferred by this *section* is probably intended to apply not only to judgments, executions, assignments, attachments, garnishments and receiving orders issued or made against the “owner,” but also as against any contractor, or sub-contractor, through whom the lien-holder derives his lien: and the existence of a lien affecting the rights of any owner, contractor, or sub-contractor, should be set up by such owner, contractor, or sub-contractor, as against any attaching creditor seeking to garnish a debt affected by such lien, otherwise such owner, contractor, or sub-contractor may have to pay it twice over.

Section 13.

(b) "**advances made on account of any conveyance or mortgage.**" This must refer to advances made under mortgages registered prior to the lien, as regards mortgages made after the registration of a lien, they are of course subsequent in priority to the lien. Formerly advances made on the security of a prior registered mortgage, without any actual notice of a lien, had priority to the lien (see *ante* p. 16), but now if the lien is registered, the mortgagee, as to all advances subsequently made, will be postponed to the lien

R. S. O. c. 136, s. 99 (1) may be thought to conflict with this *sub-section*, but it is submitted that it does not, as it only applies to instruments "*executed by the mortgagor or his heirs, executors, or administrators.*" and does not therefore, include instruments such as claims to mechanics' liens, which are not so executed.

It seems, therefore, reasonably clear that a mortgagee cannot safely make advances on the security of a previously registered mortgage, without making a search for mechanics' liens on each occasion of making such advances.

(c) "**In case of an agreement.**" This probably means an agreement which could be specifically enforced, and would not include a merely parol agreement unaccompanied by any acts which would entitle a purchaser to its specific performance.

(d) "**seller a mortgagee**" Notwithstanding this *sub-section* the interest of the seller would not be bound by a lien, where he was in no way party or privy to the contract under which the lien arises. The equitable interest

of the purchaser making such a contract, however, would be bound for what it is worth, and probably a purchaser thereof under a judgment to enforce the lien would be entitled by virtue of this provision, to enforce the specific performance of the contract between the vendor and purchaser; and any lien-holder would seem also to have an equity to call for a conveyance on payment of the purchase money. And any lien-holder paying the purchase money would be entitled to a prior charge therefor, as against other lien-holders whose liens were subject to that of the seller.

Section 13.

In some cases as we have seen, *ante* p. 8, although the contract may be made by a purchaser, yet the interest of his vendor may, by the acts of the latter, also be bound by a lien arising under such a contract: *Blight v. Ray*, 23 O. R. 415.

(e) "**Excepting where it is otherwise declared.**" The exception here referred to is that contained in *section 14 (1) post*, in favor of liens for wages for thirty days or under, as regards the percentage required to be retained by an owner under *section 11*. As regards all other liens, it is the apparent intention of the Act that there should be no preference or priority. But it is necessary, nevertheless, to remember that notwithstanding this provision, all liens do not stand on exactly the same footing, and it may happen that some liens may be paid in full, and others may remain wholly unsatisfied.

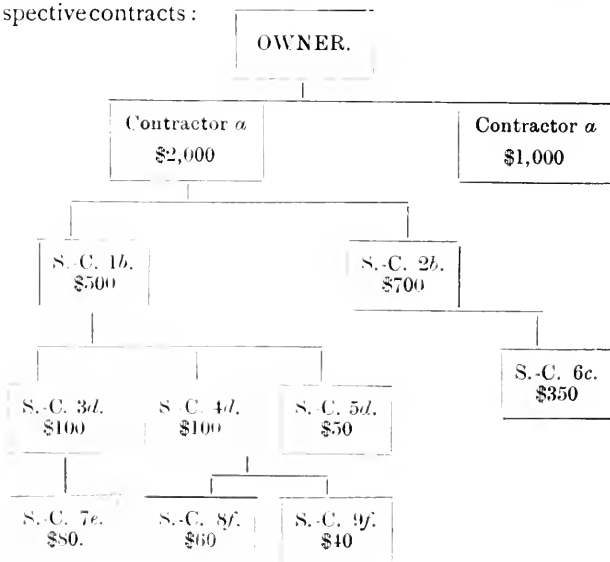
The liens of sub-contractors have in all cases to be satisfied out of the moneys payable to the contractor, or sub contractor, through whom such liens are derived, and while there may be money enough due to one con-

Section 13.

tractor to satisfy all sub-contractors under him, in the case of another contractor, there may not be sufficient.

(f) “**shall rank *pari passu*.**” As already mentioned, it is not the intention of the Act that all liens shall be satisfied *pari passu* irrespective of the question of what is due to the contractor, or sub-contractor, through whom the same are derived ; but only that all liens of the same class shall be so satisfied. The manner in which the claims of lienholders must be classified, and the mode in which their claims must be satisfied, may be gathered from the following table.

The letters S. C. are used to designate sub-contractors, and the italics indicate those who are of the same class, and the various sums represent the amount of their respective contracts :



Section 13.

As a general rule each sub-contractor can have no greater claim on the interest of the "owner" in the land than the person by whom he was employed; and when a "contractor" or "sub-contractor" has employed a "sub-contractor," the claim of such "sub-contractor" must be deducted from that of the person by whom he was employed. For example, the claims of S.-C. 1*b* and 2*b* in the above table must be deducted from the claim of the "contractor," under whom they claim; which would leave him only entitled to \$800. So also the claims of S.-C. 3*d*, 4*d*, and 5*d* must be deducted from the claim of S.-C. 1*b*, by whom they were employed, which would leave the latter only entitled to \$250, and so on with regard to the other "sub-contractors."

That this is the real meaning of the Act sufficiently appears from the concluding words of this *section*, which expressly declares that the proceeds of any sale are to be distributed among the lienholders "according to their several classes and rights." The only exception to the rule is, as already pointed out, in the case of liens for wages for thirty days or less: see *section 14 infra*.

Section 14.

Priority of
lien for wages

14.—(1) Every mechanic or labourer whose lien is for work done for wages shall, to the extent of thirty days' wages, have priority (*a*) over all other liens derived through the same contractor or sub-contractor to the extent of and on the twenty per cent. or fifteen per cent., as the case may be, of the contract price directed to be retained by section 11 of

Section 14. this Act, to which the contractor or sub-contractor through whom such lien is derived (*b*) is entitled, and all such mechanics and labourers shall rank thereon *pari passu* (*c*).
59 V. c. 35, s. 13 (1); 60 V. c. 24, s. 3.

Enforcing lien in such cases. (2) Every wage earner (*d*) shall be entitled to enforce a lien in respect of the contract not completely fulfilled (*e*).

Calculating percentage when contract not fulfilled. (3) In case of the contract not having been completely fulfilled when the lien is claimed by wage-earners, the percentage aforesaid (*f*) shall be calculated on the work done or materials furnished by the contractor or sub-contractor by whom such wage earners are employed.

Percentage not to be otherwise applied. (4) Where the contractor or sub-contractor makes default in completing his contract the percentage aforesaid shall not, as against a wage-earner claiming a lien under this Act, be applied (*g*) to the completion of the contract or for any other purpose by the owner (*h*) or contractor, nor to the payment of damages for the non-completion of the contract by the contractor or sub-contractor, nor in payment or satisfaction of any claim of

any kind against the contractor or sub-con- Section 14.
tractor.

(5) Every device by any owner, contractor ^{Devices to defeat priority of wage-earners.} or sub-contractor adopted to defeat the priority given to wage-earners for their wages by this Act shall, as respects such wage-earners, be null and void. 59 Vic. c. 35, s. 13 (2-5).

(a) "**Have priority.**" The priority given by this *section* to liens for wages is confined to the percentage required to be retained by an owner under *section* 11; as regards all other moneys due by the owner for the satisfaction of liens, the wage earner must rank equally with other lien holders of the same class as himself: see *supra*, *section* 13, note (f), and it must be borne in mind that the effect of this provision is not to give the lien for wages a paramount claim on the whole percentage, required to be retained under *section* 11, but merely a priority over all other liens derived through the same contractor or sub-contractor, as to that part of the percentage applicable to the payment of the contractor or sub-contractor, through whom the lien for wages is derived: see note (b) *infra*.

(b) "**through whom such lien is derived.**" These words restrict the priority previously given, to that portion of the percentage required to be retained under *section* 11, which is payable to the contractor or sub-contractor by whom the mechanic or labourer entitled to the lien for wages was employed: and see *supra*, *sub-section* (3).

Section 14.

(c) "**shall rank thereon *pari passu*.**" These words, though apparently making the claims of all mechanics or labourers to the extent of thirty days' wages, rank *pari passu*, or the twenty per cent. or fifteen per cent. required to be reserved, must, it is conceived, be limited in the same way as the previous part of the *section*, and cannot be read as giving such lien-holders any right to share in any part of the percentage except that to which their respective employers are properly entitled; otherwise it would lead to the obvious injustice of appropriating one man's money to pay another man's debt.

(d) "**Every wage earner.**" This *section* is not confined to wage earners in the position of sub-contractors, but seems to include all wage earners, even those who are in the position of contractors (*i.e.*, who contract directly with an owner); and seems to entitle them to a lien for their wages, even though the work they have been hired to do, has been improperly performed, and is wholly useless to their employer; but such a construction of this *section* is one that the Courts will probably be slow to adopt, if any other feasible meaning can be given to it; and it will probably be found that this *section* must be taken to be subject to an implied proviso to the effect that the non-fulfilment of the contract is not due to the act or omission of the person claiming the lien: see *sub-sections* (3), and (4), of this *section*, which are in *pari materia*, and are framed on the assumption that the wage earners referred to are in the position of sub contractors; and it may, therefore, not unfairly, be inferred that the present *sub-section* is only intended to apply in favour of wage earners who are in

the position of sub-contractors, and not themselves in default as regards the fulfilment of their own individual contracts. Section 14.

(e) "**contract not completely fulfilled**" The right given by this *section* to wage earners is apparently unlimited as to amount, and, at first blush, it would seem that liens for wages for any amount are intended to be enforceable against an owner notwithstanding that the contractor by, or under whom, the wage earner was employed, has never completed his contract with the owner, and it might be thought to be the intention of the Act, that notwithstanding that the person through whom the lien is claimed, is not entitled to receive anything from the "owner," by reason of the non-fulfilment of his contract, that, nevertheless, the claims of his sub-contractors for wages may be enforced against the owner.

We have already seen, that the ordinary rule is that the rights of sub-contractors as against an owner are not direct, but are derived either directly or indirectly through the person contracting directly with the owner, who is called the "contractor," and if the contractor is not in a position, by reason of his default, to recover anything from the owner, then, generally speaking, neither can any sub-contractor under him do so.

The present *section* appears to be intended to create an exception to this general rule in favour of liens for wages, but inasmuch as so to construe it might have the effect of making an owner liable to pay for work which is absolutely and entirely useless to him, and for the payment of which he is under no legal liability, it is

Section 14.

probable that any *sections* purporting to confer such extraordinary and unprecedented rights, will receive very careful judicial scrutiny before it is held that the words have really so extensive a meaning.

It may be remarked that the words of this *sub-section* are rather crude—"Every wage earner shall be entitled to enforce a lien." If we refer to the 4th *section* to ascertain how a lien under the Act may arise, and the extent of it, we find that it may arise, *inter alia*, for work done for any owner, contractor, or sub-contractor, but "limited in amount to the sum justly due to the person entitled to the lien, and to the sum justly owing (*except as herein provided*) by the owner,"—and if we refer to *section* 9, we find that, "*save as herein provided*" the lien is not to attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor through whom any sub-contractor claims.

It may be said that the words "except as herein provided," and "save as herein provided," in these *sections* evidently show that in some cases the Act is intended to make an owner liable beyond his contract, and such is plainly so under the provisions of *section* 11 (1), which have the effect of making an owner liable to sub-contractors, for more than is actually due by him to the contractor, through whom they claim, where he has, in violation of its provisions, made payments to the contractor in excess of the eighty, or eighty-five, per cent. referred to in that *section*.

But it appears open to argument whether the present *section* so plainly has that effect.

If the lien created by the Act, and which is the only

kind of lien given thereby, is the lien referred to in this *sub-section* as it appears to be, then it is limited to what is justly due to the contractor, or sub-contractor, through whom it is claimed, and the question naturally arises, how far can it be enforced, if, by reason of the default of a contractor, or sub-contractor, under whom such lien is claimed, nothing is legally due and owing by the owner? To allow it to be enforced against an owner who owes nothing, and is in no default, is a manifest departure from the previous express provisions of the Act, and it may not unreasonably be said that the Courts should require a more plain and explicit manifestation of the intention of the legislature, to impose such a liability on an owner, before giving that effect to the *sub-section* now under consideration.

Since the foregoing remarks were written, it has been decided by a Divisional Court that an owner is liable under *section 11*, to all sub-contractors, including, of course, wage earners, to the extent of the percentage required to be retained, notwithstanding it has not been actually earned: *Russell v. French*, 28 O. R. 215; and it is held that *Goddard v. Coulson*, 10 A. R. 1; *Re Cornish*, 6 O. R. 259, and *Re Sear & Woods*, 23 O. R. 474, are not applicable under this Act.

It may, however, be observed that it would be possible to read this *sub-section* (2) as enabling liens for wages to be enforced against an owner only in those cases where, notwithstanding the non-fulfilment of the contract, the owner was liable to pay for the work actually done, or materials supplied: or it might be construed as referring to liens for wages for 30 days or

Section 14. less, and enabling such liens to be enforced, but only as against the percentage required to be retained by the owner under *section 11*: and some ground for this view may be found in *sub-sections (3) and (4)* of this *section*; and in that view "a lien" in the present *sub section* might be read "such lien" i.e., the lien for thirty days' wages as to which priority is given on the percentage by *sub-section 1* of this *section*. At all events it must be admitted that the Act is not very explicit as to the extent to which wage earners may enforce liens for their wages, when the contract of the contractor, or sub-contractor, through whom they claim, is not fulfilled.

(f) "**the percentage aforesaid.**" The percentage here referred to is the fifteen or twenty per cent of the value of the work done or materials provided required to be retained under *section 11*, and previously referred to in *sub section 1* of this *section*; this *sub section* provides that where the contract is not completely fulfilled, it is to be calculated on the work done or materials furnished by the contractor, or sub contractor, by whom the wage earner is employed. The object of this provision would appear to be to limit the amount of the percentage in respect of which the wage earner is to have priority. under *sub-section 1* of this *section*, so as to confine his right to that proportion of the percentage retained by the owner, properly applicable to the payment of the contractor, or sub-contractor, through whom the wage earner claims.

(g) "**shall not as against a wage earner claiming a lien under this Act be applied.**" The object of this provision is apparently to get over the difficulty experi-

enced under the former Acts, under which it was held that, if the percentage required thereby to be retained by an owner was not in fact earned by, or payable to, the contractor, it could not be made available for the satisfaction of the liens of any sub-contractors claiming directly or indirectly under him : *Goddard v. Coulson*, 10 A. R. 1 ; *Re Sear & Woods*, 23 O. R. 474 ; *Truax v. Dixon*, 17 O. R. 366 ; *Harrington v. Saunders*, 23 C. L. J. 48 ; 7 C. L. T. Occ. N. 88 ; *Briggs v. Lee*, 27 Gr. 464. It seems to be still open to argument, under the present Act, that if the percentage retained is never actually earned or payable, it is not even now liable for the satisfaction of the liens of persons claiming under the defaulting contractor, or sub-contractor. This *sub-section* provides as to a particular class of lien-holders, viz., wage-earners, that the percentage is not to be applied in certain ways to his prejudice, but does it cover the case of its not being earned at all ? This difficulty is probably thought to be met by *section 11*, which requires a percentage to be retained, by the person primarily liable in any contract, of the value of the work from time to time actually done. And the intention of the Act appears to be that under that provision there shall always be in the hands of the owner, or contractor, or sub-contractor, through whom a lien is derived, the required percentage of all work actually done, and materials furnished, by whomsoever they may have been done or furnished ; but, although *sub-section (4)* prohibits the application of the percentage to the completion of the contract, or for any other purpose by the owner, or contractor, or to the payment of damages for the non-completion of the contract, it nevertheless, seems to fall short of making the percentage

Section 14.

Section 14.

liable to satisfy claims of sub-contractors, where it in fact never becomes payable : as, for instance, when it is expressly stipulated that no part of the price shall be due or payable until the whole work shall be fully completed to the satisfaction of a specified architect, and it is never so completed : see *Sherlock v. Powell* (before Q. B. Divisional Court 30 December, 1898). But if *Russell v. French*, 28 O. R. 215, be a correct exposition of the Act, then the percentage required to be retained is liable to satisfy the claims of sub-contractors, although it may never have become payable to the contractor, or sub-contractor, through whom the lien is claimed.

Claim by
"owner"
against
defaulting
"contractor,"
how far sub-
ject to charge
in favour of
lien-holders.

(h) "or for any other purpose by the owner, etc." But for this section, it is clear that the right of any sub-contractor to recover against the owner must depend upon whether, as a matter of law, there is anything due by the "owner" to the "contractor" under whom the sub-contractor claims. If the contractor make default in performance of his contract, he may be, and often is, unable to recover from the "owner," even for the work he has actually performed, and consequently would not, in such a case, be entitled to recover against the "owner" the percentage of the price required to be retained by him under section 11 : *Briggs v. Lee*, 27 Gr. 464 ; *Goddard v. Coulson*, 10 A. R. 1 ; *Re Sear & Woods*, 23 O. R. 474 ; *Truax v. Dixon*, 17 O. R. 366 ; see however *Re Cornish*, 6 O. R. 259 ; *Reggin v. Manes*, 22 O. R. 443.

It is possible that the Legislature may have intended in such a case to give the lien-holder for wages a right to enforce his lien against an owner, notwithstanding the contractor or sub-contractor through whom he claims is

in default, and even though the money required to be retained by the owner may not have been earned by the contractor, but it is doubtful whether the words actually used are sufficient for that purpose : see *per* Patterson, J. A., *Goddard v. Coulson*, 10 A. R., at p. 9, and see *Re Sear & Woods*, 23 O. R. 474 ; where it was held, under a somewhat similar provision in the former Act, that a mechanic's lien for wages was not a charge upon any part of the price which had not been actually earned by the contractor or sub-contractor through whom his lien was derived ; and see *Harrington v. Saunders*, 7 C. L. T. Occ. N. 88. The right of an "owner" to resist payment of any part of the price on the ground of non-performance of the contract is not a claim against the "contractor," it is merely a defence to a claim by the "contractor" : see *McBean v. Kinnear*, 23 O. R. 313, but the "owner" may have a claim "against the contractor for, or in consequence of, the failure of the latter to complete his contract" in the nature of a claim for damages for breach of the contract, which, under the present practice, might no doubt be counter-claimed in any action brought by the "contractor" against the "owner" for the price, either upon the contract, or where he was entitled to recover *quantum meruit* ; or the contract may provide that, on the default of the "contractor," the "owner" may proceed and complete the work himself, and deduct the cost of so doing from the contract price ; and upon a proper construction of this *section* it would appear that it is only over such claims of the "owner" that the lien for thirty days' wages is given priority. If that be the proper construction of this clause, then the lien of a sub contractor

Section 14. for wages may in some cases be liable to be defeated in the same manner as other liens by the default of the "contractor": *Re Sear & Woods*, 23 O. R. 474; see however *Russell v. French*, 28 O. R. 215.

Section 15. **15.** Nothing in this Act contained shall apply to make legal any payment made for the purpose of defeating or impairing a claim for a lien arising or existing under this Act, and all such payments shall be taken to be null and void (a). 59 V. c. 35, s. 14.

Payments made for purpose of defeating claim for lien.

(a) "shall be taken to be null and void." The effect of this *section* is to make void payments made by a debtor to his creditor, if made for the purpose of defeating or impairing a claim for lien under the Act. Thus an "owner" paying moneys due by him to his contractor in order to defeat the liens of the sub-contractor of such contractor would be invalidated; as also payments made by a contractor to any of his sub-contractors in order to defeat the claim of any sub-contractor claiming through him to whom the payment is made. Payments made by an owner to a contractor after registration of the lien of a sub-contractor, but without actual notice thereof, or without any actual intention to defeat or impair it were held, under the former *Mechanics' Lien Act*, not to be invalidated: *Briggs v. Lee*, 27 Gr. 464; and see *Worrell v. Lee*, before Blake, V. C., 19 May, 1879. The present *section* seems to contemplate an intent or purpose on the part of the person making the payment to defeat or impair the lien of some other per-

son, and unless such purpose or intent can be established a payment could not be invalidated merely on the ground that it might have the effect of defeating or impairing the lien of some other person.

Under the former *Mechanics' Lien Act* it was held that where the contract was not completed and the owner *bona fide* paid the contractor for the full amount of work actually done by him, the payment was valid as against a sub-contractor claiming under such contractor : *Briggs v. Lee*, 27 Gr. 464 ; *Re Sear & Woods* 23 O. R. 474 ; and *bona fide* payments made by the owner at the contractor's request to others, and the giving of a promissory note by the owner at the contractor's request to a third party, were upheld : *Jennings v. Willis*, 22 O. R. 439 ; also payments made by an owner for goods supplied on his own personal credit which the contractor was bound, but had neglected, to furnish : *McBean v. Kinnear*, before Holmsted Referee, September, 1892, and subsequently affirmed on appeal by Ferguson, J, 23 O. R. 313 : but payments made by an owner to an assignee of the contractor were, in that case, held to stand on the same footing as payments made to the contractor himself, and if the payment could not be properly made to the contractor himself, his assignee could acquire no better right. And in that case it was also held that payments made by an owner to a contractor after notice of a lien are only invalid where, if not made, the money would have been available for the satisfaction of the claim of the lien holder giving the notice.

It would seem probable that payments made to a contractor or sub-contractor in advance, or before they were

Section 15. due under the contract, or payment to one sub-contractor in full and to another nothing, as the partiality of the payer might determine, would be held not to be *bona fide* as against lien holders prejudiced thereby : see *Phillips*, ss. 62 *c.*, 62 *g.*, 62 *h.*

Section 16. **16—(1)** During the continuance of a lien(*a*)
 Restraining attempt to remove material affected by lien. no portion of the materials affected there by shall be removed to the prejudice of the lien, and any attempt at such removal may be restrained on application to the High Court, or to a Judge or officer (*b*) having power to try an action to realize a lien under this Act.

Costs. (2) The Court, Judge or officer to whom any such application is made, may make such order as to the costs (*c*) of and incidental to the application and order as he deems just.

Material furnished for certain purposes not to be subject to execution. (3) When any material (*d*) is actually brought upon any land to be used in connection with such land for any of the purposes enumerated in section 4 of this Act, the same shall not be subject to execution (*e*) or other process to enforce any debt (other than for the purchase thereof) due by the person furnishing the same (*f*). 59 V. c. 35, s. 15.

THE MECHANICS' LIEN ACT OF ONTARIO.

(a) "**During the continuance of a lien.**" A lien if ^{Section 16.} _{unregistered before the expiration of thirty days from the completion of the work or the delivery of the materials,} ^{Time within which lien continues.} will cease, unless within that time proceedings have been instituted by the lien-holder, or some other lien-holder in which the lien may be realized, and a certificate of such proceedings have been registered in the proper registry office, : see *section 23*. A registered lien ceases at the expiration of ninety days from the completion of the work, or delivery of the materials, or the expiry of the period of credit, unless proceedings are in the meantime commenced and a certificate thereof registered : see *section 24 (1)*.

And the registration of a lien ceases to have any effect at the expiration of six months from the registration thereof unless it be re-registered within the said period, or proceedings be instituted and a certificate thereof registered : see *post, section 24 (2)*.

(b) "**or to a judge or officer.**" The Master in Ordinary, Local Masters, Official Referees, or Judges of the County, or District Court, in any county where the lands in question are situate, have power to try actions to enforce liens, in addition to any Judge of the High Court : see *section 33*. By this *section* the above-mentioned officers are empowered to grant injunctions.

Where an injunction is applied for without notice to the opposite party, it is usually granted only for a short period, and if the party obtaining it desires to continue it further, he is required to give notice of the motion to the opposite party. Interim injunctions, *i. e.*, injunctions, ^{Injunctions, jurisdiction to grant.}

Section 16. tions granted before judgment in an action, are only
 Injunction, granted, as a general rule, upon the applicant undertak-
 undertaking ing to be answerable for any damages resulting to the
 as to damages. opposite party, by reason of the granting of the injunc-
 tion. This undertaking is usually embodied in the
 injunction order, in the following terms, viz. :—"and the
 plaintiff by his counsel undertaking to abide by any
 order which this Court may make as to damages in case
 the Court shall hereafter be of opinion that the defend-
 ant shall have sustained any by reason of this order
 which the plaintiff ought to pay. This Court doth
 order, etc. ;" and where an injunction is granted *ex parte*
 under this *section*, it would seem to be requisite that an
 undertaking of this kind should be given, and recited in
 the order.

Costs

(c) "**may make such order as to costs.**" It is un-
 usual to order the costs of an interim injunction to be
 paid forthwith : they are usually either reserved to be
 disposed of at the trial of the action, or are made costs
 in the action. But in cases where the costs of the action
 are payable out of a fund, as is usually the case in ac-
 tions to enforce liens, and the costs are incurred by rea-
 son of the necessity of applying for an injunction to
 restrain the wrongful act of a defendant, such defendant
 may be, and generally is, ordered personally to pay the
 costs so occasioned ; otherwise the costs would, in effect,
 be thrown upon the plaintiff and other lien-holders wher-
 ever the fund is insufficient to pay the claims in full, or
 else upon the person entitled to the surplus after pay-
 ment of the liens, who might not be the defendant who
 had occasioned the injunction proceedings.

(d) "**material.**" This word would seem to include Section 16.
Materials
exempted. not only materials actually incorporated or intended to be incorporated into the structure, but such materials as may be required in the construction, alteration or repair of any building, etc., though not incorporated, nor intended to be incorporated, therein; as, for example, a hoisting apparatus: *Dixon v. LaFarge*, 1 E. D. Smith, 722; or scaffolding, or machinery used in connection therewith; or gunpowder, candles, or steel furnished for working a mine: *Keystone v. Gallagher*, 5 Col. 23. So where it is necessary to blast and remove rock from land preparatory to building, the powder and fuses necessary for that purpose would appear to be "materials" within the meaning of this section: *Hazard Powder Co. v. Byrnes*, 12 Abb. Pr. 469; S. C. 21, How. Pr. (N.Y.) 189.

(e) "**shall not be subject to execution.**" This Exemption
from execu-
tion, how far
it extends. section is not intended to exonerate the materials from all executions, but only from executions to enforce any debts *due by the person by whom the materials are furnished or procured*, excepting such as were incurred by the latter for the purchase of the materials. The proper construction of the Act appears to require that the words "any debt" in *sub-section 3*, should be qualified by the words "due by the person furnishing the same," for if the latter words were to be held to qualify only the words "other than for the purchase thereof," it would seem to follow that the materials of all buildings erected by one person for another, are absolutely and indefinitely exempted from all liability to execution, whether against the "owner" or any other person, a result which it seems needless to say could never have been intended. Al-

Section 10.

though the Act does not protect the materials from execution to enforce a debt incurred for the purchase thereof, it does not follow that the materials will be in all cases saleable even under such an execution; that will depend on whether the materials had, or had not, ceased to be the property of the debtor at the time of the seizure thereof by the sheriff. After materials have become incorporated in a building, they would cease to be liable to execution against the "contractor" or "sub-contractor" furnishing them, and there is nothing in this *section* to exonerate them from liability to executions against the "owner." But such executions might be subject to the right of lien, if any, acquired by the "contractor" or "sub-contractor" under this Act: see *section* 13.

Execution,
against
"owner" will
bind materials
incorporated
in land.

(f) **"Due by the person furnishing the same."**

These words are to be read in connection with the previous part of this *section*, from which it will be seen that they refer only to persons furnishing or procuring materials for the specific purpose mentioned "*for any owner, contractor, or sub-contractor*": see *section* 4. In other words, this *section* exempts materials from liability for certain debts due by the person *by whom* they are furnished or procured, but does not exempt them from liability to execution for any debts due by the person *to, or for, whom* they have been furnished or procured. For example, materials furnished by a "contractor" for an "owner" would be free from liability for the debts of the "contractor," except such as may have been incurred for the purchase of such materials, even before the incorporation thereof in the building, etc.; but they would not be exempt from liability to execution for any debts

of the "owner" so soon as the materials should, by incorporation into his building, or otherwise, have become his property; see, however, *section 13*. Section 16.

17.—(1) A claim for lien applicable to the case may be registered (a) in the registry office of the registry division or where the land is registered under *The Land Titles Act* in the land titles office of the locality in which the land is situated (b) and shall set out (c):— Section 17.
Registration
of claim for
lien.
Rev. Stat.
c. 138.

(A) The name and residence of the person claiming the lien and of the owner of the property to be charged (d) (or of the person whom the person claiming the lien, or his agent, believes to be the owner of the property to be charged) and of the person for whom and upon whose credit the work (or service) was or is to be done (f), or materials furnished or placed, and the time (g) or period within which the same was, or was to be, done or furnished or placed; Contents of
claim of lien.

(B) A short description of the work (or service) done or materials furnished or placed or to be furnished or placed;

(c) The sum claimed as due or to become due; 59 V. c. 35, s. 16 (1 a-c);

Section 17.
 Rev. Stat.
 c. 138

(D) A description of the land to be charged (h) sufficient for the purpose of registration, and where the land is registered under *The Land Titles Act* such claim shall also contain a reference to the number of the parcel of the land and to the register in which such land is registered in the Land Titles Office.

(E) The date of expiry of the period of credit (if any) agreed by the lien-holder for payment for his work (or service) or materials where credit has been given.

Form of claim.

(2) The claim may be in one of the forms given in the Schedule to this Act and shall be verified by the affidavit (i) of the person claiming the lien or of his agent (j) or assignee (k) having a personal knowledge of the matters required to be verified and the affidavit of the agent or assignee shall state that he has such knowledge. R. S. O. 1887, c. 116, s. 55 ; 59 V. c. 35, s. 16.

Description of
 lands where
 lien registered
 against rail-
 way.

(3) When it is desired to register a claim for lien against the lands of a railway company, it shall be a sufficient description of such lands to describe them as the lands of such railway company and every such claim

for lien shall be registered in the general registry in the registry office for the registration district where such lien is claimed to have arisen. 60 V. c. 24, s. 4. Section 17.

(a) “**may be registered.**” Although the registration of the claim is not necessary to create a lien, it is essential to its continuance after the expiration of thirty days after the work has been completed, or the materials furnished: see *section 22*, unless in the meantime a suit has been commenced to enforce it by the lien-holder, or some other lien-holder, and a certificate of *lis pendens* registered: see *section 23*. If the period of credit between the “owner” and the “contractor,” or any other lien-holder and his debtor, extend beyond the time limited by *sections 22, 23, and 24*, for registering a lien, or a *lis pendens*, and the lien or *lis pendens* be not registered, the non-registration will have the effect of defeating the lien: formerly where the period of credit had not expired, within the time limited for bringing an action, no suit could be brought to enforce the lien, and consequently no *lis pendens* could be registered as required by *sections 23, 24*: see *Burritt v. Renihan*, 25 Gr. 183; *Neill v. Carroll*, 28 Gr. 34; 339; *Haggerty v. Grant*, 2 B. C. R. 173; but under the present Act if the period of credit extend beyond the time limited by *sections 23, 24*, for bringing an action, the action may, nevertheless, be now commenced, and registered as a *lis pendens* within the period mentioned in those *sections*, but further proceedings in the action are to be stayed until the period of credit has expired: see *section 28*. Registration of lien.

Where registration before action is necessary.

Section 17. lien is essential where the interest of a lessor is sought to be charged under *section 7 (2)*: see *ante*, pp. 49, 50, notes (*f*), (*g*).

Registration of a lien ceases to have any effect at the expiration of six months from the registration, unless within that period the lien be re-registered, or proceedings be instituted to realize it, and a *lis pendens* registered: see *section 24 (2)*.

By whom
liens may be
registered.

A claim may be registered not only by the person doing the work, or furnishing the material, but also by his assignee, where the assignment is in writing; and in such a case the assignee is to make the affidavit verifying the claim: see *sections 26*, and *17 s.-s. 2*: *Grant v. Dunn*, 3 O. R. 376.

Application of
Registry Act
to liens.

The intention of the Act appears to have been that the conflicting claims of unregistered lien-holders, and persons claiming under registered instruments, should be determined without regard to *The Registry Act*; but the course of judicial decision has run counter to this idea: see *ante*, p. 13, *et seq.*; and though this Act says *The Registry Act* is not to apply to liens, the courts have virtually said that *The Registry Act* does apply to them, and, in the present state of the authorities, unless a lien is registered, there is danger that it will lose priority over subsequent grantees, or mortgagees, for value without notice, whose conveyances or mortgages are first registered: see *Wanty v. Robins*, 15 O. R. 474; *Rose v. Peterkin*, 13 S. C. R. 677; *McNamara v. Kirkland*, 18 A. R. 271. If therefore a lien-holder desire to preserve his priority over subsequent grantees or mortgagees, it seems, in the

present state of the authorities, advisable in all cases to register his lien promptly. Actual notice, however, seems sufficient to preserve priority as against subsequent transferees : *McNamara v. Kirkland*, *supra*.

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Where priority is claimed by the lien-holder against a prior registered mortgagee or grantee, he should be made an original defendant, and the grounds upon which the plaintiff claims priority should be alleged : see *Reinhart v. Shutt*, 15 O. R. 325.

Persons claiming under prior registered deeds, how made parties.

A difference of opinion formerly prevailed as to whether an execution creditor could, by procuring an attaching order against the "owner," as a garnishee, obtain priority over mechanics who had previously acquired liens, where such liens had not been registered at the time the garnishee order was obtained, but where the time allowed for registering such liens had not expired : *Lang v. Gibson*, 21 C. L. J. 74 ; *McCully v. Ross*, 22 C. L. J. 63, and see remarks on these two cases, 22 C. L. J. p. 75 ; but all doubts on this point seem now to be set at rest by section 13 (1).

Attaching creditor can not acquire priority over lien-holder.

(b) "**the land is situated**" Where the land affected by the lien is partly in one registration division, and partly in another, the registration should be made in both divisions.

Registration of lien, where lands situate in different divisions.

(c) "**shall set out.**" The word "shall" is imperative : see R. S. O. c. 1, s. 8, s.-s. 2.

(d) "**owner of the property to be charged.**" The owner here spoken of is the person against whose interest in the land the lien is to be enforced, not necessarily the owner of the fee : see *ante*, p. 7, *note c*. Where the

"Owner," how to be described in registered lien.

Section 17. "owners" were a corporation aggregate, the misnomer of the corporation in the registered claim was held to invalidate the registration, as against a subsequent mortgagee: *Boult v. Wellington Hotel Co.*, before Blake, V.C., at Guelph, 1st Oct., 1878; and see *Moore v. Bradley*, 5 Man. 49 and cases there cited; but, in *Patrick v. Walbourne*, (before Falconbridge, J., 30 September, 1895) it was held that a misnomer, in a claim of lien, of a corporation as against whom a lien on the increased selling value was claimed, was not fatal to the lien. This case afterwards went to appeal on another point, (see 27 O. R. 221) but the decision of Falconbridge, J., on the question of misnomer does not appear to have been questioned. It has been held to be a sufficient compliance with this section if the name and address is stated of the person who was the "owner" of the property at the date the lien first arose, and that a subsequent assignee is bound, even though he acquires title under a conveyance registered before the lien, and his name does not appear in the registered lien: *Makins v. Robinson*, 6 O. R. 1; *Re Wallis v. Vokes*, 18 O. R. 8; see *post*, section 19 and notes: see however *McVean v. Tiffin*, 13 A. R. 1; *Hynes v. Smith*, 27 Gr. 150; *Reinhart v. Shutt*, 15 O.R. 325.

(c) "or of the person whom the person claiming the lien, or his agent believes to be the owner of the property." These words are new, and are introduced no doubt to prevent a lien from being defeated by any mistake on the part of any sub-contractor as to the name of the "owner," and permit a certain amount of latitude in the claim in this respect; and it would seem that a

lien might be enforced against the true "owner" liable, notwithstanding any mistake which might be made as to his name in the registered lien. After these words a semi-colon should probably be inserted.

Section 17.

(f) "**of the person for whom and upon whose credit the work or service was or is to be done,**" etc. The omission of the name and residence of the person for whom, and upon whose credit, the work is done, from the claim as registered, was, under the former Act, held to be fatal, and a defect which might be relied on by a contractor through whom the lien holder claimed, notwithstanding that the "owner" made no objection: *Wallis v. Skaine*, 21 O. R. 532; but it is possible that under the present Act such an omission would not defeat the lien, unless it could be shown that someone had been prejudiced thereby: see *post*, section 19.

(g) "**and the time.**" A statement that the work was done between a named day and "on or before" another day named, was held to be sufficiently specific: *Flack v. Jeffrey*, 10 Man. 514.

(h) "**the description of the land to be charged.**" Description of land in registered lien. Care must be taken to describe the land correctly. Where it forms part of a sub-division according to a registered plan, it must be described according to that plan. General descriptions such as "part of lot A," without specifying distinctly the part intended, should be avoided; as to Railways a special provision is made by s.-s. (3).

(i) "**verified by the affidavit.**" Affidavit verifying lien, how and by whom to be sworn. For form of affidavit, see the Schedule to this Act. Where the affidavit referred to the claim as "the paper annexed

Section 17. marked A," and the paper annexed had no such mark on it, but was proved to be the paper prepared for registration, and in that condition annexed to the affidavit, it was held that the omission to mark it "A" did not invalidate the registration: *Currier v. Friedrich*, 22 Gr. 243. The affidavit may be sworn before any commissioner for taking affidavits in the county where the affidavit is sworn: R. S. O. c. 74, s. 12; *Truax v. Dixon*, 25 C. L. J. 249; whether a notary public is authorized to take such affidavits: see R. S. O. c. 175, ss. 3, 4; and see also *Roberts v. McDonald*, 15 O. R. 80, where the point was taken, but not adjudicated. It is probable that an affidavit would not be invalid though sworn before the solicitor of the claimant or his partner or clerk, notwithstanding *Con. Rule* 522; see *Canada Permanent Loan & Savings Co., v. Todd*, 22 O. R. 515, but it would be safer to avoid such a question, as the point has been differently decided in England: see *Baker v. Ambrose*, (1896) 2 Q. B. 372.

(j) "or of his agent." Formerly the affidavit of an agent was insufficient: *Grant v. Dunn*, 3 O. R. 376.

(k) "or assignee." It would seem that it is only when the assignee claims under a written assignment that he is competent to claim a lien: see *section 26*.

Section 18.

What may be included in claim.

18. A claim for lien (a) may include claims against any number of properties (b), and any number of persons claiming liens upon the same property may unite therein,

but where more than one lien is included in one claim each lien shall be verified by affidavit as provided in section 17 of this Act. Section 18.

59 V. c. 35, s. 17.

(a) "**A claim for lien.**" The "claim for lien" is that referred to in *section 17*, viz., the claim of lien for registration.

(b) "**any number of properties.**" A lien, of course, can only be properly claimed against property upon, or in respect of which, work has been done or materials furnished. This provision is probably intended to apply to liens for work or materials done or furnished on different properties of the same owner. It can hardly be intended to apply to the case of liens claimed by a person on different lots owned by different owners. "Any number of properties" may, therefore, be taken to mean "any number of properties of the same owner upon or in respect of which work or materials have been done or furnished."

Section 19.

19.—(1) A substantial compliance (a) with sections 17 and 18 of this Act shall only be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites (b) of the said sections unless in the opinion of the court, judge or officer who has power to try an action under this Act, the owner, contractor or sub-contractor, Claims not to
be invalidated
for informal-
ity.

Section 19.

mortgagee or other person, as the case may be, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

(2) Nothing in this section contained shall be construed as dispensing with registration (c) of the lien required by this Act. 59 V. c. 35, s. 18.

This is a new provision, and is intended to prevent liens from being defeated on merely technical grounds.

(a) "**A substantial compliance**" These words would seem to negative the idea that a total non-compliance with the provisions of *sections 17 and 18* can be condoned. There must be, therefore, a compliance to some extent with the provisions of those *sections*.

By R. S. O. (1887) c. 126, s. 17, it was provided that an affidavit verifying a claim of lien "substantially in accordance" with the form prescribed by that Act should be sufficient, and under that Act an objection was taken to a claim, on the ground that the name of the person who was the "owner" at the time the claim was registered, was not mentioned in it. The lien-holder in that case was employed by Robinson & Elliott, who, after the lien had attached, had sold their interest to Poussette. The names of Robinson & Elliott alone appeared in the registered claim as "owners." On this point Ferguson, J., said, "It was urged for the defence that the registration of the lien was not good, because the name of Poussette, who was the 'owner' at the time, was not mentioned in it. On

Omission
of name of
"owner,"
effect of.

Section 19.

this subject I have looked at some of the American cases. In the case of *Jones v. Shawhan*, 4 Watts & Serg, at p. 262, Gibson, C. J., says: 'But as the claim is against the building instead of the person, and as the name is only a circumstance of description to specify the property and give notice to purchasers, entire accuracy in regard to the ownership may not be indispensable; the more so as the statute expressly requires no more than the name of the reputed owner, and it might be sufficient to file it against the past, or present one. It is certain, however, that the name of the owner when the building was commenced satisfies the requirements of the law.' And, after referring to the language of R. S. O. (1887) c. 126, section 2, s.s. 2, and *Ib.* section 16, Ferguson, J., proceeds, "Yet I am of the opinion that the reasoning in the case to which I have referred applies, especially when I look at the date of the conveyance to Poussette, and the allegation of the plaintiff, that he did not know anything of it, and I am of opinion that this alleged defect is not fatal, although it has been said that the statute relative to mechanics' liens, being in derogation of the common law, should be strictly complied with": *Makins v. Robinson*, 6 O. R. 1; and see *Re Wallis & Vokes*, 18 O. R. 8.

The making of the affidavit verifying the claim by a person not authorized by the statute to make it has been held a fatal defect under the former *Mechanics' Lien Act*: *Grant v. Dunn*, 3 O. R. 376; but possibly under the provisions of the present Act such a defect would not be fatal.

Affidavit by
unauthorized
person.

(b) "by reason of failure to comply with any of the requisites." The previous part of this section pre-

Section 19.

cludes the idea that "any of the requisites of *sections 17 and 18*," could be held to mean "all of the requisites" of those *sections*. This *section* appears to require that there shall be some substantial compliance with *sections 17 and 18*, but that the omission of some particulars may not be fatal, provided the omission be not prejudicial to the party as against whom the lien is claimed, or any other person, and then only to the extent to which he is prejudiced.

(c) "**dispensing with registration.**" See *sections 17, and 22*. Registration of the lien is not absolutely necessary in all cases. If the action to enforce the lien is brought, and a certificate of *lis pendens* is registered, within the period prescribed by *section 23*, that is sufficient without any other registration of the lien; except where the lien is claimed against the owner of the fee, under *section 7 (2)*, *supra*, p. 41.

Section 20.

Lien to be
registered
an incum-
brance.

20.—(1) The registrar upon payment of his fee, shall register the claim, so that the same may appear as an incumbrance against the land therein described (a).

Fee for
registration.

(2) The fee for registration shall be twenty five cents. If several persons join in one claim, the registrar shall be entitled to a further fee of ten cents for every person after the first.

Manner of
registration.

(3) The registrar shall not be bound to copy in any registry book any claim or affi-

davit, but he shall number each claim, and shall insert in the alphabetical and abstract indexes (b) the like particulars as in other cases; he may describe the nature of the instrument as "Mechanics' Lien." 59 V. c. 35, s. 19, Section 20.

(a) "**the land therein described.**" This *sub-section* seems to render it absolutely incumbent on the lienholder to insert such a sufficient description of the land intended to be charged as will enable the Registrar to comply with this *section*, and any substantial defect in the claim of lien in this respect, might very probably be considered fatal, notwithstanding *section* 19.

(b) "**shall insert in the alphabetical and abstract indexes.**" These words are imperative, but where the claim of lien tendered for registration is in due form, but the Registrar omits duly to insert it in the indexes, the lien is not thereby defeated: see *Lawrie v. Rathbun*, 38 U. C. Q. B. 255.

21. Where a claim is so registered, the person entitled to the lien shall be deemed a purchaser *pro tanto* (a), and within the provisions of *The Registry Act*, but except as herein otherwise provided (b), *The Registry Act* shall not apply to any lien arising under this Act. 59 V. c. 35, s. 20. Section 21.
Lien holder to be deemed a purchaser.
Rev. Stat. c. 136.

Section 21.
 Lien-holder a
 purchaser.

(a) "shall be deemed a purchaser *pro tanto*." The benefit of the provisions of *The Registry Act* is confined to persons who are purchasers or mortgagees, for value, without actual notice : see *The Registry Act*, ss. 87, 97. In favour of such persons, by registration of the instruments under which they claim, priority is secured over other instruments prior in date but not registered, and of which they have no actual notice.

Claim of
 lien-holder
 superior to
 that of execu-
 tion creditor.

A person who registers a mechanic's lien is, under this *section*, therefore, entitled to claim priority over an unregistered mortgage or other conveyance made by the owner, previous to the registration of such lien, and of which the lien-holder had not actual notice. A lien-holder is, therefore, placed in a better position than an execution creditor, who has no better right than his execution debtor : *Russell v. Russell*, 28 Gr. 419.

Registration
 of lien, effect
 of.

Prior to registration, a mechanic's lien is valid, and binding on the land, and it would seem to be the intention of the Act that the registration of the lien, within the time prescribed by *secs.* 22, or 23, should not have the effect of postponing the lien to the date of its registration, but rather of continuing the charge created by the lien, as from the date at which it originally attached. If this be the correct interpretation of the Act, then, in order to postpone a registered lien-holder to a prior unregistered instrument, it would be necessary to show that the lien-holder had actual notice of the prior unregistered instrument some time previous to his acquiring his lien, and not merely previous to his registering it ; but see *supra*, p. 52.

For instance, a mechanic may acquire a lien by virtue of commencing certain work : see *section 4*, and after the commencement of the work, and before he has registered his lien, he may acquire actual notice of an unregistered mortgage, his subsequent registration of his lien would not deprive him of the priority he had acquired before he had notice of the lien. It is true that it has been held, in *Hynes v. Smith*, 8 P. R. 73 ; 27 Gr. 150, that a mortgage created subsequently to the acquisition of a lien, but registered prior to the lien, was entitled to priority over the latter. That decision, however, is not very satisfactory, as the two judges who arrived at that conclusion seem to have overlooked the effect of *sections 5, and 2, s.-s. 3, of the former Act (now embodied in sections 7, and 2, s.-s. 3, of this Act)*, which provide that the lien is to bind not only the interest of the "owner," but also of all persons claiming under him whose interests are acquired subsequently to the lien ; and also this *section*, now under consideration, which declares *The Registry Act* is not to apply to liens, except as otherwise provided. Proudfoot, J., who dissented from the other two members of the Court, alone appears to have considered the effect of these *sections*. It is, therefore, open to doubt whether the reasons given by the majority of the Court for the decision in the case of *Hynes v. Smith* were correct. In *McVean v. Tiffin*, 13 A. R. 1, it was held that a mortgagee who had registered his mortgage prior to a mechanic's lien being acquired, but who did not actually advance the money secured thereby until after the acquisition of the lien, was, nevertheless, not a subsequent incumbrancer to the lien-holder. In this case, too, the effect of the *sections* above referred to, and

Section 21.

Notice to
lien-holder
of prior unreg-
istered claims,
effect of.*Hynes v.*
Smith,
McVean v.
Tiffin, effect of.

Section 21. that now under consideration, does not appear to have received the attention of the Court. It is possible, that these cases may be upheld on other grounds than those assigned in the judgment of the Court : see *ante*, p. 12, note (g).

How far
Registry Act
affects lien-
holders

(b) "**except as herein otherwise provided.**" The exception referred to is that contained in *sections 22, 23, 24, post*. Until the time prescribed by those *sections* has expired, the lien is valid and binding without registration as against the "owner" with, or under whom, the contract was made, in respect of which the lien arises ; and if an action be commenced within that time to enforce the lien, and a certificate thereof be registered, then no further registration of the lien is necessary under the Act. But as against assignees of the person who was the "owner" at the time the contract was made in respect of which a lien exists, registration appears to be necessary in order to preserve the lien's priority, which may, in the present state of the authorities, be defeated by the prior registration of the instruments under which such assignees claim without actual notice of the lien : see *McVean v. Tiffin*, 13 A. R. 1 ; *Wanty v. Robins*, 15 O. R. 474.

Effect of cases
as to applica-
tion of Registry
Act to liens.

(c) "**The Registry Act shall not apply.**" The effect of this provision appears to be, that so far as the claims of lien holders are concerned, either in relation to other liens, or registered instruments, they are to be dealt with as if *The Registry Act* did not exist. It must be admitted, however, that the current of legal decision appears virtually to have abrogated this clause in the

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III

Act: see *McVean v. Tiffin*, 13 A. R. 1; *Hynes v. Smith*, 27 Gr. 150; *Reinhart v. Shutt*, 15 O. R. 325. Section 21.

The principle of *The Registry Act* is, that by registration of an instrument, notice of it is given to all persons dealing with the land affected thereby, and registered instruments obtain priority according to the order of their registration, and are entitled to priority over prior unregistered claims, unless there be actual notice brought home to the person claiming under the prior registered instrument prior to its registration, of the existence of the prior unregistered claim: R. S. O. c. 136, ss. 87, 97; *Peterkin v. Rose*, 13 S. C. R. 677. This principle, it would seem, was not intended to apply to mechanics' liens. Principle on which *Registry Act* based.

Under *section 4* a mechanics' lien is created without registration, and it binds the interest not only of the "owner," but also of all persons claiming under him whose rights are acquired after the work in respect of which the lien is claimed is commenced, or the materials have been commenced to be furnished: *sections 7, and 2, s.-s. 3*. And it does not appear to have been intended that the lien thus created, should be defeated by the prior registration of any transfer of interest, absolutely, or by way of mortgage, executed by the "owner," after the lien had once attached, provided the lien were duly registered within the time prescribed by *section 22*, or an action brought, and a certificate thereof registered, as provided by *section 23*: see *ante*, p. 12, note (g). Its non-application to liens.

If *The Registry Act* does not apply to mechanics' liens under the circumstances above mentioned, it seems to involve the proposition that conflicting claims between lien-holders, and other persons, must be dealt with. If *Registry Act* does not apply to liens, principle on which conflicting rights should be dealt with.

Section 21.

be adjudicated, and their rights adjusted, as though *The Registry Act* had not been passed: see R. S. O., c. 136, s. 39; *Latch v. Bright*, 16 Gr. 653; and the Courts, in dealing with conflicting claims of lien-holders, and other persons, in the interval between the acquisition of the lien, and the time limited for its registration, should be governed, not by the rules laid down by *The Registry Act*, but by those principles of equity which would be applicable if no such Act as *The Registry Act* were in existence, among which would be those relating to notice, etc. Thus, if a mechanic had notice of the existence of a vendor's lien for unpaid purchase money before commencing his work, his mechanic's lien would not be entitled to priority over it: see *Phillips*, ss. 243, 244. But notice that work is going on upon land is not necessarily actual notice of any lien for such work: see *Douglas v. Chamberlain*, 25 Gr. 288; *Richards v. Chamberlain*, *Ib.* 402; *Graham v. Williams*, 9 O. R. 458. It has been, however, already pointed out, (see *ante*, p. 12 *et seq.*) that the trend of authority has been in favour of the view that notwithstanding this *section* the conflicting rights of lien-holders, and transferees of the "owner," are governed by *The Registry Act*, even in the interval between the acquisition of the lien and the time limited by the Act for the registration of the lien, or a certificate of *lis pendens*.

Section 22.

Claims for
liens when to
be registered.

22.—(1) A claim for lien by a contractor or sub contractor (a) may, in cases not otherwise provided for, be registered (b) before or during the performance of the contract or

within thirty days after the completion thereof. Section 22.

(2) A claim for lien for materials (*c*) may be registered before or during the furnishing or placing thereof (*d*) or within thirty days after the furnishing or placing of the last material so furnished and placed

(3) A claim for lien for services (*e*) may be registered at any time during the performance of the service or within thirty days after the completion of the service.

(4) A claim for lien for wages (*f*) may be registered at any time during the performance of the work for which such wages are claimed, or within thirty days after the last day's work (*g*) for which the lien is claimed.
59 V. c. 35, s. 21 ; 60 V. c. 24, s. 5.

(a) "**a contractor or sub-contractor.**" Every person claiming a lien under this Act must be in the position either of a *contractor*, i. e., of one who contracts directly with the owner, or a *sub-contractor*, i. e., one who contracts with a contractor or some other sub-contractor. This *section*, however, appears to draw a distinction between contractors and sub-contractors based upon the nature of the work they perform, or the subject matter of the lien. And notwithstanding that *sub-section* (1) in terms actually includes every class of lien-holder that there can be, the subsequent *sub-sections* appear further to divide them into other classes, viz.,

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those who claim liens for "materials," and those who claim for "services," and those who claim for "work ;" and a different rule is laid down for the claimants of the two latter kind of liens to that which is prescribed for all other claimants of liens. By *sub-section* (1), it will be observed, a lien may be registered before the performance of the contract, but by *sub-sections* 3, and 4, the liens for services or work cannot be registered before the performance of the service or work, but only during its performance, or within thirty days after the completion of the service or work. Notwithstanding, therefore, the generality of the words of *sub-section* (1) it is probable that they will be judicially held to be limited to liens not specifically provided for in the two following *sub-sections*.

Registration
of lien, neces-
sary to secure
priority.

(b) "**may be registered.**" If the cases of *Hynes v. Smith*, 27 Gr. 150, and *McVean v. Tiffin*, 13 A. R. 1, are a correct exposition of the statute, it would seem that in order to secure the lien-holder's priority, as against persons dealing with the "owner" subsequently to the commencement of the work, the lien must be registered before the instrument under which the owner's subsequent vendee or mortgagee claims title, otherwise the lien holder will be postponed thereto, unless the prior registered transferee had actual notice of the lien before the registration of his deed : *Wanty v. Robins*, 15 O. R. 474. The accuracy of the reasons given for those decisions appears to be open to some doubt, (see *Makins v. Robinson*, 6 O. R. 1). But even if a subsequent grantee or mortgagee of the "owner" were not able to acquire priority over a lien-holder, merely by prior registration of the instrument under which he claims, yet

where he has acquired a legal title, and has had no actual knowledge of the lien, it is possible (apart altogether from *The Registry Act*) that he could, under such circumstances, successfully claim priority over the lien.

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A mechanic's taking a promissory note, which matures and is dishonoured before the expiration of the period limited by this *section* for registering a lien, is no waiver of his right to register a lien : *Lindop v. Martin*, 3 C. L. T. 312 ; *Makins v. Robinson*, 6 O. R. 1 ; and see *Van-Court v. Bushnell*, 21 Ill. 624. But the taking of a security, inconsistent with the right of lien, is a waiver of the lien : see *Kinzey v. Thomas*, 28 Ill. 502 ; *Benneson v. Thayer*, 23 Ill. 374 ; and so is the taking of a negotiable note for the debt, which has been negotiated and is out of the power of the claimant of the lien when the action is brought : *Clement v. Newton*, 78 Ill. 427 ; *Croskey v. Corey*, 48 Ill. 442 ; and it has been held that if the right to a lien is once waived it cannot be revived : *Edmonds v. Tiernan*, 21 S. C. R. 406 ; see, however, *section 28, post*, which may be found to have, to some extent, modified the effect of some of these cases.

Taking security, how far a waiver of right of lien.

(c) "**materials.**" This word includes every kind of moveable property : see *section 2 (5)*.

(d) "**furnishing or placing thereof**" Where goods were furnished from time to time as required, not under any contract, it was held each supply was a separate and distinct transaction : *Chadwick v. Hunter*, 1 Man. 39. But where the goods were obtained from time to time as required for the purpose of a building, in pursuance of a prior understanding that

Thirty days, how computed where goods supplied from time to time.

Section 22.

all the goods required therefor should be got from the person supplying the materials, it was held that the entire transaction was linked together by this prior arrangement, so that the lien for the whole of the goods might be registered within thirty days from the last delivery: *Morris v. Tharle*, 24 O. R. 159; *Lindop v. Martin*, 3 C. L. T. 312. If, therefore, materials are delivered under a single contract piecemeal, it would seem that the thirty days in which the action must be brought, or the lien registered, would not commence to run until there had been a complete delivery of all the materials included in the particular contract. But where a material-man has a single contract for the supply of materials to a contractor who has entered into separate and distinct contract with several "owners," the time for filing a lien by such material-man against any one of the "owners," is not to be measured with reference to the duration of the deliveries under the contract between the material-man and the contractor, but by the completion of the work by the contractor for the "owner" against whom the lien is claimed: *Re Moorehouse & Leak*, 13 O. R. 290. But a sub contractor for materials must register his lien within thirty days after the last delivery to the contractor or sub-contractor with whom he contracts; the time for registering his lien is not extended by any delay on the part of the contractor or sub-contractor to whom the materials are supplied in placing them on the premises: *Hall v. Hogg*, 20 O. R. 13. Where the work has been done, or the materials have been furnished, and accepted by the "owner," the existence of some slight defect, which is subsequently remedied by the contractor, will not be deemed to extend the time for registering

Remedying
defects, time
not extended
thereby.

the lien until thirty days from the time the defect is remedied, even though the work or materials were accepted on the understanding that the defect was to be remedied : *Neill v. Carroll*, 28 Gr. 30 ; (affirmed on rehearing, Blake, V.C., diss.), *Ib.* 339 * ; *Makins v. Robinson*, 6 O. R. 1 ; *Kelly v. McKenzie*, 1 Man. 169. But where the completion of the work was delayed, its subsequent completion after a long delay was held to extend the time for registering the lien : *Irwin v. Beynon*, 4 Man. 10. -

Where a material-man supplied goods to a contractor on credit, and charged them in a running account, and the contractor received moneys from time to time from the "owner," which he paid over to the material-man, and no appropriation of payments was made by either the "owner" or the "contractor," and the material-man credited his receipts generally in account with the "contractor," and registered a lien for the balance, including in such lien the latest items of his account, it was held that he was entitled to the lien claimed : *Lindop v. Martin*, 3 C. L. T. 312.

Goods supplied to "contractor" on running account, lien for.

(e) "**services.**" See *ante*, p. 11, note (c), as to the probable meaning of this word.

(f) "**wages.**" would appear to include money payable to a mechanic or labourer for every other kind of work not included in the term "service." It includes the wages of the day labourer as well as those of the skilled artizan : see *section 2 (6)*, *ante*, p. 5.

* See *Summers v. Beard*, 24 O. R. 641, where it appears that the effect of the judgment on rehearing in *Neill v. Carroll* is as here stated, and that the report in 28 Gr. is inaccurate.

Section 22

(g) "last day's work." It would seem probable that when a lien for work is claimed, there must be a *bona fide* performance of the last day's work here referred to, under the same contract as that under which the other work for which a lien is claimed has been performed; and that it will not be possible to revive a lien for work which has expired by lapse of time, by doing subsequently another day's work on the premises upon which the lien is claimed under a new contract, or in pretended performance of a contract which has been in fact completed for more than thirty days. But where the completion of the work has been delayed its subsequent completion, even after a long delay, will extend the time for registering the lien, or bringing an action to enforce it: *Irwin v. Beynon*, 4 Man. 10

Section 23.

Liens to cease if proceedings not had within time fixed by Act.

23. Every lien which is not duly registered (a) under the provisions of this Act shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof unless in the meantime (b) an action is commenced to realize the claim (c), or in which the claim may be realized under the provisions of this Act, and a certificate thereof (d) according to Form 6 in the schedule hereto, signed by the proper officer of the Court, is duly registered (e) in the registry office of the registry division, or where the land is registered under *The Land*

Titles Act, in the land titles office of the Section 40
locality, wherein the lands in respect of which
the lien is claimed are situate. 59 V. c. 35,
s. 22 ; 60 V. c. 3, s. 3 ; c. 15, Sched. A. (76).

(a) "**which is not duly registered.**" The time for the Registration
of lien, when
to be made.
registration of liens is prescribed by the preceding *section*.
Under the former Act, wherever the period of credit
agreed to by the mechanic extended beyond thirty days
after the completion of the work, or the furnishing of
the materials, the registration of the claim was absolutely
necessary in order to preserve the lien, because no action
could be brought to enforce the lien until the period
of credit had expired : *Burritt v. Renihan*, 25 Gr. 183 ;
Neill v. Carroll, 28 Gr. 30 ; *Ib.* 339 ; and see *Ritchie v.*
Gundy, 7 Man. 532. Under the present Act, however,
an action may be commenced, and a *lis pendens* regis-
tered before the period of credit has expired, but further
proceedings in the action by the plaintiff must be stayed
till the period of credit has expired : see *post*, *section* 28.

(b) "**unless in the meantime.**" It is not essential Action to
enforce lien,
time for
bringing.
to the preservation of the lien that the proceedings
should have been instituted by the lien-holder himself ;
it will be sufficient if they have been instituted by some
other lien holder claiming a lien on the same property :
see *section* 32 : *Bunting v. Bell*, 23 Gr. 584 ; *Hovenden*
v. Ellison, 24 Gr. 448 ; *McPherson v. Gedge*, 4 O. R.
246. An action by another lien-holder would not have
the effect of reviving any lien which had expired under
this *section* before the action was commenced. Although
an action to enforce a lien may be begun before the

Section 23. period of credit agreed to has expired : see *section 28*, still in order to entitle a lien-holder to maintain the action against the owner, the period of credit (if any) between the "contractor" and "owner" must have expired : *Burritt v. Renihan*, 25 Gr. 183 ; and it would seem that where the action is brought by a "sub-contractor," the period of credit (if any) between him and the "contractor," or "sub-contractor," by whom he was employed, must also have expired before the action can be properly proceeded with by the plaintiff.

This *section* applies to every claim to enforce a lien under the Act. Where a lien-holder filed a bill and obtained a decree to enforce his lien as against the "owner," it was held he could not afterwards, and after the lapse of time for bringing an action, file another bill against a prior mortgagee to obtain relief under *section 7 (3)* : *Bank of Montreal v. Haffner*, 29 Gr. 319 : 10 A. R. 592 ; S. C. *sub nom. Bank of Montreal v. Worswick*, Cass. Dig. 289.

The principle of *Bank of Montreal v. Haffner* seems to require that actions to enforce mechanics' liens must be commenced as against all parties against whom relief is claimed within the time prescribed by *sections 23, 24* ; but see *Cole v. Hall*, 12 P. R. 584 ; 13 P. R. 100.

Actions should be commenced against all parties interested within prescribed time.

(c) "an action is commenced to realize the claim." The proceedings must be instituted against the proper parties, within the prescribed time. Usually where parties are added by amendment after the action is commenced, the action as against such parties does not relate back to the issue of the writ, but is only deemed to have been commenced as against them at the time they are added : see *Share v. Cunningham*, 12 Gr. 101 ; *MacDonald v.*

Wright, 14 Gr. 285-6 ; *Dumble v. Larush*, 27 Gr. 187, and where the action as originally constituted is defective, it cannot be made good by amendment, after the time for commencing the action has expired : *e. g.* where a plaintiff originally alleged his contract to have been made with C, it was held that he could not after the time for bringing his action had expired, amend his proceedings by alleging the contract to have been made with D : *Davidson v. Campbell*, 5 Man. 250 ; but see *Cole v. Hall*, *supra*.

Section 23.

Parties.—The “owner,” *i. e.*, the person whose interest in the land in question is sought to be sold, must always be made a defendant ; and also the person liable on the contract under which the plaintiff claims : *Wood v. Stringer*, 20 O. R. 148. And where the owner with whom the contract was made has, after the lien attached, sold, or mortgaged, or otherwise transferred, or incumbered his interest, in the land in question, it would seem proper to make the transferee also an original defendant. Where such subsequent transferee has registered the instrument under which he claims, prior to the lien, it has been held that he could not under the former practice be added as a subsequent encumbrancer in the Master’s office : *Hynes v. Smith*, 27 Gr. 150 ; *McVean v. Tiffin*, 13 A. R. 1 ; *Re Craig*, 3 C. L. T. 501 ; *Reinhart v. Shutt*, 15 O. R. 325 ; and see *ante*, p. 12, section 2, note (g). If, notwithstanding the prior registration of a subsequent transfer by the owner, the lien-holder claims that his lien is a prior claim to that of the transferee, that question can only be raised by making the transferee an original defendant.

Parties to actions to enforce liens.

Even under the former Act it was held that lien holders

Section 23. whose status the plaintiff disputed need not be made original defendants, but that it was competent for the plaintiff to dispute their status on their being added as parties in the Master's office: *Hall v. Hogg*, 14 P. R. 45; and see *Cole v. Hall*, 12 P. R., 584; 13 P. R. 100.

Where the action is brought by a sub-contractor, the contractor, or sub-contractor, by whom the plaintiff was employed, is a necessary defendant: *Wood v. Stringer*, *supra*.

Prior mortgagee.

Where relief is claimed against a prior mortgagee, under section 7, s.s. 3, such mortgagee must also be made an original defendant: *Bank of Montreal v. Haffner*, 29 Gr. 319; 10 A. R. 592; S. C. *sub nom. Bank of Montreal v. Worstick*, Cass. Dig. 289. See further as to parties to actions to enforce liens, *post*, pp. 142, 143.

Certificate *lis pendens*.

(d) "a certificate thereof." This means a certificate that the proceedings have been commenced. The certificate should show the names of the parties, plaintiff and defendant, to the action, and should also accurately describe the land over which the lien is claimed as it is described in the proceedings.

For Form of Certificate of *lis pendens*, see Appendix.

How issued.

The certificate must be issued by the officer with whom the proceedings are commenced. Where the seal of a Court of Record is affixed to the certificate, it proves itself, and can be registered without affidavit: see R. S. O. c. 136, s. 51. An affidavit would however seem necessary where the certificate is not under seal.

(e) "duly registered." The proceedings must not only have been commenced within the thirty days, but the certificate must have been registered within that

period, or the lien will cease. Where the land in question is situate partly in two registration divisions, a certificate of the commencement of the proceedings must be registered in both divisions. Section 23.

A mistake of the registrar in indexing or omitting to index the certificate will not invalidate its registration : *Lawrie v. Rathbun*, 38 U. C. Q. B. 255.

It would appear to be a sufficient registration of a *lis pendens* within the meaning of this *section*, if any action be registered within the prescribed time in which the lien-holder is entitled to recover his claim : see *Bunting v. Bell*, 23 Gr. 584 ; and per Osler, J., *McPherson v. Gedge*, 4 O. R. 246 ; and see *section* 32.

24.—(1) Every lien which has been duly registered (a) under the provisions of this Act shall absolutely cease to exist (b) after the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or the expiry of the period of credit, (c) where such period is mentioned in the claim of lien registered, unless in the meantime an action is commenced to realize the claim under the provisions of this Act, or an action is commenced in which the claim may be realized (d) under the provisions of this Act, and a certificate registered as required by the next preceding Section 24.
When lien to
cease if regis-
tered and not
proceeded
upon.

Section 24. section, 59 V. c. 35, s. 23 (1); 60 V. c. 15, Sched. A (76).

Lien to expire
at end of six
months unless
renewed.

(2) The registration of a lien shall cease to have any effect at the expiration of six months from the registration thereof, unless the lien shall be again registered (e) within the said period, except, in the meantime, proceedings have been instituted to realize the claim and a certificate thereof has been duly registered in the proper registry or land titles office. 59 V. c. 35, s. 23 (2).

Action to
enforce reg-
istered lien,
time for.

(a) "**which has been duly registered.**" The preceding *section*, having prescribed the time within which an action must be brought to enforce unregistered liens, the present *section* prescribes the time within which an action must be brought to enforce a registered lien. By registering the claim within the thirty days after the completion of the work, or furnishing of the materials, an additional period of sixty days is gained for commencing an action to enforce the claim.

Where a contractor, working for several "owners," has but a single contract for the supply of materials with the material-man, the time for the latter's registering a lien or commencing an action against any one of the "owners" is not to be measured with reference to the duration of deliveries under the contract between the material-man and the "contractor," but by the completion of the work

by the contractor for the "owner" against whom the lien is claimed: *Re Moorehouse & Leak*, 13 O. R. 290; but a sub-contractor for materials must register his lien, or commence the action to enforce it within thirty days after the last delivery to the contractor or sub-contractor with whom he contracts, as the time for registering his lien, or bringing an action to enforce it, is not extended by any delay on the part of the contractor or sub-contractor to whom the materials are supplied in actually placing them on the premises: *Hall v. Hogg*, 20 O. R. 13.

Section 24.

(b) "shall absolutely cease to exist." A lien may be put an end to, not only by failure to bring a suit to enforce it and registering a certificate of *lis pendens* within the time limited by this section, but also by the lien-holder accepting security for his debt inconsistent with his right of lien: see *Kinzey v. Thomas*, 28 Ill. 502; *Croskey v. Carey*, 48 Ill. 442; *Benneson v. Thayer*, 23 Ill. 374; *Clement v. Newton*, 78 Ill. 427. But the taking of a promissory note, which is not negotiated and is dishonored at maturity, is no waiver of the lien: *Tan-Court v. Bushnell*, 21 Ill. 624; and see also section 28.

Lien to cease if not prosecuted or if security inconsistent with right of lien be taken.

(c) "or the expiry of the period of credit." The period of credit between the "owner" and "contractor" may expire before that between a sub-contractor and the person by whom he is employed; in such a case it would seem that the "period of credit" intended (so far as an action by the sub-contractor is concerned) is the latter period, as until that has elapsed, the sub-contractor is not in a position to carry on an action

Time for bringing action where credit given.

Section 24. to enforce his lien against the owner: *Burritt v. Renihan*, 25 Gr. 183; *Haggerty v. Grant*, 2 B. C. R. 173. The existence of an agreement to give credit will not, however, prolong the time for commencing an action, unless it be stated in the registered claim when the period of credit agreed to will expire: see *section 25*. *Section 28* seems to provide for the case of a further extension of time for payment beyond that named in the registered claim.

Other lien holders of same class, when entitled to benefit of action.

(d) **“an action is commenced in which the claim may be realized.”** An action by any one lien-holder will keep alive the liens of all other lien-holders on the same property: *section 32*; but where the plaintiff bringing the action turns out to have no cause of action, other lien-holders who have, cannot get the benefit of the plaintiff's action: *Re Sear & Woods*, 23 O. R. 474.

A defence filed in an action to set aside the lien is not a proceeding to realize the claim, though a counter-claim if properly framed and a certificate thereof duly registered, might be so: *McNamara v. Kirkland*, 18 A. R. 271.

(e) **“unless the lien shall be again registered.”** Where the period of credit extends beyond six months from the first registration, under this *sub-section* the lien must be kept re-registered every six months, until the action is commenced and the *lis pendens* registered: see *section 28*, which enables the action to be commenced even though the period of credit has not expired, by proceeding under that *section* the necessity for re-registration would be avoided.

25. If there is no period of credit (*a*), or if the date of the expiry of the period of credit is not stated in the claim so registered, the lien shall cease to exist upon the expiration of ninety days after the work or service has been completed or materials furnished (*b*) or placed, unless in the meantime an action shall have been commenced and a certificate registered as required by section 23 of this Act. 59 V. c. 35, s. 24.

Section 24.

When lien to cease if there is no period of credit.

(*a*) **If there is no period of credit.** The object of requiring the period of credit to be stated in the registered claim of lien, is to enable persons dealing with the property affected thereby to see when the lien will expire by effluxion of time : see, however, the provisions of section 28, and note (*b*), *post*, p. 135.

(*b*) **“work or service has been completed or materials furnished”** Where the work has been done, or the materials have been furnished and accepted by the owner, the existence of some slight defect, which is subsequently remedied by the contractor, will not be deemed to extend the time for taking proceedings to enforce the lien by action, until the defect is remedied, even though the work or materials were accepted only on the undertaking that the defect was to be remedied : *Neill v. Carroll*, 28 Gr. 30 ; affirmed on re-hearing, *Ib.* 339, Blake, V. C., dissenting ;* *Makins v. Robinson*, 6 O. R. 1 ; *Kelly v. McKenzie*, 1 Man. 169. But where the com-

Acceptance of work, subject to remedying a defect, effect of.

* See note, *ante* p. 117.

Section 25. — pletion of the work has been delayed, its subsequent completion, even after a long delay, will extend the time for bringing an action to enforce the lien : *Irwin v. Beynon*, 4 Man. 10.

Section 26.
Death of
lien-holder.

26. In the event of the death of a lien-holder his right of lien shall pass to his personal representatives ; and the right of a lien-holder may be assigned by any instrument in writing (a). 59 V. c. 35, s. 25.

Assignment
of lien.

(a) “**may be assigned by any instrument in writing.**” Usually no particular form of words is necessary to create an assignment of the lien ; it is sufficient if the intent is shown. Where a mechanic assigned his interest in a lien, and subsequently took a re-assignment of it in trust for his assignor, it was held, before this *section* was passed, that he was entitled to enforce the lien : *Currier v. Friedrich*, 22 Gr. 243.

Rights of
assignee.

The assignee can take no greater right under the assignment than the assignor himself had. Where a lien has expired in consequence of the lien-holder omitting to register it, a subsequent assignment of the debt, “with all rights and liens,” passes no right of lien to the assignee : *Hooper v. Sells*, 58 Ga. 127 ; and an assignment would no doubt be held to be subject to all such equities, in respect of the whole, or any part, of the claim assigned, as existed at the time of the assignment, or before notice thereof to the debtor, or other person sought to be made hable, in the same manner, and to

the same extent, as if there had been no assignment : Section 26.
see Jud. Act (R. S. O., c. 51) s. 58 (5).

Even, apart from this *section*, so far as the lien on the Assignment must be in writing. land is concerned, it would seem that there could be no valid assignment of it, except by writing ; because the lien, being an interest in land : *Stewart v. Gesner*, 29 Gr. 329, under the *Statute of Frauds*, a parol assignment would be invalid : see *Ex parte Hall*, 10 Chy. D. 615.

27.—(1) A lien may be discharged by a Section 27. receipt (a) signed by the claimant, or his Discharge of lien. agent duly authorized in writing (b), acknowledging payment, and verified by affidavit and registered ; such receipt shall be numbered and entered by the Registrar like other instruments but need not be copied in any book, but the registrar shall enter against the entry of the lien to which the discharge relates the word "discharged," and state the registration number of such discharge ; the fees shall be the same as for registering a claim of lien.

(2) Upon application the court or judge Security or payment into court and vacating lien thereon. or other officer (c) having power to try an action to realize a lien, may receive security or payment into court (d) in lieu of the amount of the claim and may thereupon vacate the registration of the lien.

Section 27.

Vacating registration on other grounds.

When notice of application to vacate not requisite.

(3) The court or such judge or other officer may vacate the said registration upon any other ground (*e*).

(4) Where the certificate required by section 23 or section 24 of this Act has not been registered within the time limited, and an application is made to vacate the registration of a lien after the time for registration of the certificate required by sections 23, 24 and 25 of this Act, the applicant shall not be required to give notice of the application to the person claiming the lien, and the order vacating the lien may be made *ex parte* (*f*) upon production of the certificate of the proper registrar certifying the facts entitling the applicant to such order, 59 V. c. 35, s. 26 (14).

Receipt in discharge of lien, form of.

(a) “**a receipt.**” No form of receipt is prescribed; but either the receipt or the affidavit verifying it ought to be so worded as to clearly identify the lien in respect of which it is given. A mere receipt for so much money, without any specific reference to the lien, or to the land affected by the lien, could not be properly registered, unless the affidavit supplied the deficiency. It is preferable that the receipt itself should show on its face to what particular lien it relates, so as to avoid, as far as possible, the possibility of controversy on the point.

This *sub-section* refers to voluntary discharges of liens by lien-holders. Where the lien-holder wrongfully refuses to give a discharge of his lien, an application may be made, under *sub-section* 3, *supra*, for the discharge of the lien; or the "owner" may apply, under *section* 25 (2), to vacate the lien on giving security for the amount claimed by the lien-holder.

Section 27.

Lien-holder wrongfully refusing to discharge lien

Vacating lien or giving security.

For a Form of Receipt and Affidavit verifying same, see Appendix, p. 293.

(b) "**or his agent duly authorized in writing.**"

Where a lien is discharged by an agent, it seems advisable that the document giving him authority to act should also be registered.

(c) "**court or judge or other officer.**" The various officers who have power to try actions to enforce liens under this Act are enumerated in *section* 34, *post*. In addition to ordering a lien to be vacated, they have power to award costs of vacating the registration: see *post*, *section* 44.

(d) "**payment into court.**" Where payment into court is directed, the order should direct the amount required to be paid into court, to be paid into the credit of the action subject to further order; and the money must be paid into court in the manner prescribed by the *Con. Rules*, 405-410. The words "in lien" which follow are obviously a misprint for "in lieu," and the mistake was corrected by 62 Vict. St. 1, c. 2, Sched (3.)

(e) "**upon any other ground.**" Where the land had been sold under a power of sale contained in a prior mortgage, the lien was ordered to be vacated on

Section 27. the surplus realized from the sale being paid into court :
Finn v. Miller, 26 C. L. J. 55.

(f) “**may be made *ex parte*.**” A careful perusal of this *section* will show that it is only in those cases where it appears on the face of the registered instrument that it has not been registered in time, that the application to vacate it can be made without notice ; wherever it is necessary to produce any other evidence than the Registrar’s certificate to show that a claim of lien ought to be vacated, it would appear to be necessary to give notice of the application to the claimant of the lien sought to be vacated. This seems to be reasonably clear from the concluding words of the *sub-section*, which show that the evidence on which the order may be made *ex parte* is the Registrar’s certificate. Even on notice, the court will not, on a summary application, decide against the lien, except in a clear case, but will leave the matter to be fought out by suit : *Re Wallis & Vokes*, 18 O. R. 8.

Section 28.
 Certain acts
 not to prejudice
 right to
 enforce lien.

28. The taking of any security (a) for, or the acceptance of any promissory note for, or the taking of any other acknowledgment of the claim, or the giving of time (b) for the payment of the claim, or the taking of any proceedings for the recovery of the claim or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice or destroy any lien created by

this Act, unless the lien-holder agrees in writing that it shall have that effect; provided, however, that a person who has extended the time for payment of any claim for which he has a lien under this Act to obtain the benefit of this sub-section shall commence an action to enforce such lien within the time limited by this Act, and register a certificate as required by sections 23, 24 or 25 of this Act, but no further proceedings shall be taken in the action until the expiration of such extension of time; provided further, that notwithstanding such extension of time (c), such person may, where an action is commenced by any other person to enforce a lien against the same property, prove and obtain payment of his claim in such action, as if no such extension had been given. 59 V. c. 35, s. 26 (5).

(a) "**The taking of any security.**" The provisions of this *sub-section* are entirely new. They must be read in connection with the provisions of *sections* 23, 24 and 25. Where the taking of the security involves the extension of the time for payment beyond the period limited by those *sections* for the bringing of the action to enforce the lien, the action to enforce the lien must nevertheless be commenced within the period limited by those *sections* or it will cease to exist. All, therefore,

Section 28.

that this *sub-section* seems to mean, is that the taking of security, or the acceptance of a note or the taking of any other acknowledgment of the claim, or the giving of time for the payment of the claim shall not *per se* avoid the lien : but if in addition to the taking of the security, note or acknowledgment, or the giving of time, the lien-holder also neglects to comply with the other provisions of the Act limiting the time within which an action is to be brought to enforce his claim, then the lien will be incapable of being enforced notwithstanding this *section*. Even under the former Acts, which contained no such provision as that now under consideration, it was held that the taking of a promissory note which matured and was dishonoured before the expiration of the period limited for bringing an action to enforce the lien, was no waiver of the right of lien : *Lindop v. Martin*, 3 C. L. T. 212 ; *Makins v. Robinson*, 6 O. R. 1. But it has been held that the taking of a security inconsistent with the right of lien, amounted to a waiver of the lien : see *Kinzey v. Thomas*, 28 Ill. 502 ; *Bennesson v. Thayer*, 23 Ill. 374 ; and the taking of a negotiable note for the debt, and negotiating it, so that at the time the lien was sought to be enforced the note was not in the power of the claimant of the lien, was held to be a bar to the enforcement of the lien : *Clement v. Newton* 78 Ill. 427 ; *Croskey v. Corey*, 48 Ill. 442 ; and it is difficult to understand how any other conclusion could be arrived at consistently with equity even under the provisions of this Act. While it may be reasonably assumed that the Legislature intended to afford mechanics and others entitled to the benefit of the Act every facility for the recovery of their claims, it cannot be assumed

that it intended to subject their debtors to a double liability in respect of the same debt, which would be the case if a claimant of a lien could enforce his lien, and at the same time a third person, to whom he had transferred a note received in respect of his claim, could also sue the maker and recover thereon.

We must therefore conclude that the preliminary part of this *sub-section* is based on the assumption (1), that notwithstanding the taking of the security, proceedings to enforce the lien are commenced within the time limited by *sections* 23, 24, and 25 ; and (2), that at the time the lien holder seeks to enforce the lien he is in a position to restore the security received by him.

As to the effect of giving a negotiable instrument in payment of a debt, see *Bence v. Shearman*, (1898) 2 Ch. 582 ; *Hudley v. Hudley*, *Ib.* 680.

(b) “**giving of time.**” “The giving of time for the payment of the claim” seems to stand on a somewhat different footing to the acceptance of security. The giving of time is in effect an extension of the period of credit.

The case of an extension of the period of credit beyond thirty days from the delivery of the materials, or the completion of the work for which a lien is claimed, is provided for by *sections* 24, and 25. It will be seen by reference to those *sections* that where the extension of time of payment is a part of the original contract it must be stated in the registered claim, and if it is not stated, the lien might be defeated, as the lien-holder could not, but for this *section*, bring his action

Section 28.

within the time prescribed : but it is possible that under this *sub section* where such an omission has been made in the registered claim, the lien-holder will now be entitled to commence an action as if no period of credit had been given, but that further proceedings in it will be stayed until the period of credit has expired. This introduces a somewhat novel principle into the bringing of an action to enforce liens. In ordinary cases a plaintiff's rights must be determined as of the date when his writ issues, and if he brings his action prematurely, it must be dismissed, notwithstanding that at the time of the trial his right of action may have matured. This *section* seems to authorize the commencement of the action, before the plaintiff could, in an ordinary case, be in a position to sue.

The provisions of this *sub-section* seem also to cover the case of an extension of time being given beyond that stated in the registered claim. In such a case the action must be commenced as if the extension had not been given, but further proceedings in it will be stayed until the extended period of credit has expired.

(c) "**notwithstanding such extension of time.**" This concluding clause will enable a lien-holder to take the benefit of any action of any other lien-holder, notwithstanding he himself may have agreed to an extension of time for the payment of his own claim. Although as far as his remedy *in rem* is concerned, the lien-holder is absolved by this *sub-section* from the extension of time for payment to which he has agreed, it would appear to be still binding on him so far as any personal remedy against his debtor is concerned.

29. Any lien-holder (*a*) may at any time demand of the owner or his agent, the terms of the contract or agreement with the contractor for and in respect of which the work, services or materials is or are performed or furnished or placed, and if such owner or his said agent shall not, at the time of such demand or within a reasonable time thereafter, inform the person making such demand, of the terms of such contract or agreement, and the amount due and unpaid (*b*) upon such contract or agreement, or shall intentionally or knowingly (*c*) falsely state the terms of said contract or agreement, or the amount due or unpaid thereon, and if the person claiming the lien shall sustain loss by reason of such refusal or neglect or false statement, the said owner shall be liable in an action therefor (*d*) to the amount of such loss. 59 V. c. 35, s. 27; 60 V. c. 24, s. 6.

Section 29.

Lien-holders to be entitled to information from owner as to terms of contract.

(*a*) "**Any lien-holder.**" This is a new provision. It is more particularly intended for the benefit of sub-contractors, and to enable them to obtain information as to the exact state of the contract between the owner and the contractor under whom, directly or indirectly, they may have entered into any sub-contract. It is to be noticed that until a person is in the position of a lien-

Section 20. holder, he is not entitled to take the benefit of this *section*. An owner is entitled to a reasonable time within which to comply with the demand. The demand is not required to be in writing, and may therefore be made verbally. In order to prevent disputes as to what were the terms of the demand, it would be prudent to make it in writing. The owner is not required to answer the demand in writing, usually the exhibition of the original contract with the contractor in question, would be a sufficient compliance with a demand as to the terms of the contract : as regards the owner's answer as to the amount remaining due and unpaid, it would be prudent that that should be made in writing, though it is not absolutely necessary that it should be so. No form is given in the Act, but a form of demand may be found in the Appendix.

(b) "**the amount due and unpaid.**" The owner in stating the amount due and unpaid must be careful to be accurate. It may be open to doubt what is intended by these words. Is the amount due and unpaid, the balance of the contract price at the time of the demand unpaid, or is it the amount which has then been actually earned and remains unpaid ? The latter would seem to be the proper construction, as the price is not due until it has been earned. In any case, it would be prudent for an owner in complying with the demand, to distinguish between what has been earned, and what has not.

(c) "**shall intentionally or knowingly.**" It is not every mis statement which will render an owner liable to the penalty imposed by this *section*, there must be an

intention to mislead, or an actual knowledge that the statement was false when made. Section 29.

(d) “**an action therefor.**” These words would seem to indicate that a lien holder seeking to make an “owner” liable under this *section* must do so by action brought in the ordinary way, it being, in effect, an action of deceit, to which the summary mode of proceeding provided by *section* 31 may not be considered applicable; on the other hand, *section* 31 (2) in terms applies to “an action under the Act.”

30. The Court or Judge, or other officer Section 30.
 (a) having power to try an action to realize Order for inspection of contract by lien-holder.
 a lien, may on a summary application (b) at any time before or after any action is commenced for the enforcement of such lien, make an order for the owner or his agent to produce and allow any lien-holder to inspect any such contract, and may make such an order as to the costs of such application and order as may be just. 59 V. c. 35, s. 28.

(a) “**The Court or Judge, or other officer.**” See *post*, *section* 31, as to the tribunals before which actions to enforce liens may be prosecuted.

(b) “**on a summary application.**” The meaning of this would appear to be that the application may be made without first commencing an action, by the issue of a writ, or in any other manner. Or if an action has

Section 30. been commenced, then that the particular relief referred to in this *section* may be obtained on motion without waiting for the trial of the action. Notice of the application must always be given to the owner or his agent, and two clear days' notice would appear to be sufficient.

Section 31.
Mode of
realizing liens.

31.—(1) The liens created by this Act may be realized by actions in the High Court (*a*) according to the ordinary procedure (*b*) of that court, excepting where the same is varied by this Act.

(2) Without issuing a writ or summons, an action under this Act shall be commenced by filing in the proper office a statement of claim, verified by affidavit (*c*) (Form 5).

(3) The statement of claim shall be served within one month after it is filed (*d*), but a Judge or other officer having power to try the action may extend the time for service thereof, and the time for delivering a statement of defence (*e*) (Forms 7 and 8) shall be the same as for entering an appearance in an action in the High Court.

(4) It shall not be necessary to make any lien-holders parties defendant (*f*) to the action, but all lien-holders served with the notice of trial shall for all purposes be treated

as if they were parties to the action. 59 V. Section 31.
c. 35, s. 29.

(a) “**may be realized by actions in the High Court.**” The Act makes a considerable change in the procedure to enforce mechanics’ liens. It abolishes the summary procedure prescribed by the Act of 1890 (53 Vict. c. 37); and it takes away the jurisdiction of both County and Division Courts to enforce mechanics’ liens, and requires all such claims to be enforced by proceedings in the High Court, no matter what the amount claimed may be. This change was probably suggested by the fact that neither the County or Division Courts are adapted for working out such claims satisfactorily.

(b) “**according to the ordinary procedure.**” Reference to the subsequent *sub-sections*, and to *section 33*, show that the ordinary procedure in an action is to be departed from by dispensing with the writ of summons, and in other particulars, and also in the mode of trial. It is presumed that what is intended is that the ordinary procedure is to govern except in those particulars in which an express variation is made by this Act. The statement of claim would therefore appear to be intended to be filed, not with a referee or other officer who is to try the action, but, in the usual office of the High Court for filing statements of claim in the locality where the proceedings are commenced. Where any of the defendants are out of the jurisdiction it may be advisable to commence the action by writ of summons in the ordinary way: see *infra*, p. 143, note (d).

Section 31. (c) "a statement of claim verified by affidavit."

The statement of claim here referred to is a statement of claim such as is required to be filed in an ordinary action: see *Bickerton v. Dakin*, 20 Ont. 192, 695. It will be necessary for the plaintiff to determine therefore at the outset, and before filing his statement of claim, the parties necessary to be named as plaintiffs, and defendants.

Parties:—*Plaintiffs.* Formerly in actions to enforce mechanics' liens the action was on behalf of all other lien holders *of the same class*, and any number of lien-holders *of the same class* could join as plaintiffs; but under the present Act an action to enforce a mechanic's lien is to be taken to be brought for all lien-holders on the same property, and the benefit of it is no longer confined to lien-holders of the same class as the plaintiff. So also any number of lien-holders on the same property, no matter whether of the same class or not, may join as plaintiffs: see *post section 32*. It would seem therefore unnecessary for a plaintiff to name any other lien-holders as parties, either as plaintiffs or defendants. It would, however, be a saving of expense for as many lien-holders as possible to be named as plaintiffs, because lien-holders not named as parties must nevertheless be served with notice of trial: see *post section 36*. It is not stated expressly that the plaintiff is to state in the style of the cause that the action is on behalf of himself and all other lien-holders on the property in question, but it is advisable to do so.

Defendants. As a general rule all persons as against whom the plaintiff seeks any relief should be made

defendants. The "owner" should always be made an original defendant, and in the term "owner" is included not only the person who employed the contractor claiming the lien, or under whom any sub-contractor may claim, but also any person to whom such owner may have subsequently conveyed his interest in the land. Where there has been a transfer of interest by the original owner, if any personal remedy is claimed against the original owner, both he and the person in whom his interest in the land has become vested at the time of the commencement of the action should be made defendants.

Where the plaintiff claims relief as against a prior mortgagee under *section 7 (3)*, the mortgagee should be made an original defendant: see *Bank of Montreal v. Haffner*, 29 Gr. 319; 10 A. R. 592, S. C. *sub nom. Bank of Montreal v. Horswick*, Cass. Dig. 289. If not made an original defendant, *semble*, he could not be subsequently added as a party under *Con. Rule 659*, so as to obtain relief against him: see *Duflon v. Horning*, 26 O. R. 252.

But it would seem that it is unnecessary to make any person claiming to be a lien-holder a defendant, even though his right to rank as such is disputed by the plaintiff: *Hall v. Pitz*, 11 P. R. 449; *Hall v. Hogg*, 14 P. R. 45; and see *supra*, *sub-section 4*.

(d) "shall be served within one month after it is filed" The statement of claim must be served in the same way as a writ of summons; service on a solicitor who accepts service, and undertakes to appear would be sufficient: *Con. Rule 145*. Where personal service, or service on a solicitor, cannot be effected, however, an

Section 31.

order may possibly be obtained permitting some other mode of service: see *Con. Rule*, 146; *Holmested & Langton*, p. 267. It may be observed, however, that *Con. Rule*, 146, only refers to writs of summons, and does not expressly include other documents by which a cause or proceeding may be commenced, as does *Con. Rule*, 145.

Where a defendant is out of the jurisdiction of the Court, it seems doubtful whether there is any jurisdiction to give leave to serve the statement of claim out of the jurisdiction: *Holmested & Langton*, p. 279. Wherever any of the defendants are out of the jurisdiction, it would seem advisable to commence the action by writ of summons, and obtain leave to serve it on the defendants out of the jurisdiction under *Con. Rule*, 162: see *Holmested & Langton*, pp. 279, 280, at all events, until it is judicially determined that leave can be given to serve a statement of claim only.

The month within which the service must be effected is a calendar month: *The Interpretation Act* (R. S. O., c. 1), s. 8, s.s. 15.

Con. Rule 350 provides that "Pleadings shall not be amended or delivered in the Long Vacation except by consent, or unless directed by the Court or a Judge." It is probable that the *Rule* would be held to be not applicable to a statement of claim delivered under this section, but until the point is so decided, it may be desirable, for the sake of caution, to obtain leave to file the statement of claim, where it is necessary to file it in the Long Vacation.

As to amendment of the pleadings : see *Orr v. Davie*, Section 31.
22 Ont. 430.

(e) "**the time for delivering a statement of defence.**"
The proceedings to enforce a lien, as we have seen, are to be commenced by filing a statement of claim ; and it would seem from this *sub section* that the intention of the Act is to dispense with the necessity of entering any appearance, and that the defendant may without doing so, at once file his statement of defence, in which respect the procedure resembles the procedure by bill and answer in equity before *The Judicature Act*, but there seems nothing to prevent a defendant from entering an appearance, without putting in a defence in cases where he does not dispute the plaintiff's claim, and at the same time wishes to be notified of the future proceedings in the action.

(f) "**It shall not be necessary to make any lien-holders parties defendant**" The question of parties has already been discussed in the notes *ante*, pp. 121. 142 : and see further *section 32* and notes, *post*.

32. Any number of lien-holders, claiming liens on the same property (a) may join in an action, and any action brought by a lienholder shall be taken to be brought on behalf of all other lien-holders (b) on the property in question. 59 V. c. 35, s. 30. Section 32.
Lien holders
joining in
action.

(a) "**claiming liens on the same property.**" Formerly an action to enforce a mechanic's lien was for the

Section 32. benefit only of all the lien-holders of *the same class*, and only those of the same class could join as plaintiffs: but under the present Act the action may be brought, and is to be taken to be, for the benefit of all having liens on the same property. It may be a question whether the words "same property" ought not to be construed to mean not necessarily the same piece of land, but rather the same estate or interest in the same land. For example: If certain lien holders have a lien against the estate or interest of A, a tenant in possession, and others have a lien against the estate or interest of B, the landlord of A in the same land, it might be questionable whether these liens, though against the same property, could properly be enforced in the same action. For while A would be properly a defendant to the action to enforce the lien against his interest, he would not be a proper party to an action to enforce a lien against B's interest, and *vice versa*.

Right of other
lien-holders to
intervene in
action.

(b) "**taken to be brought on behalf of all other lien-holders**" Other lien-holders on the same property, not parties to the action, who are entitled under this *section* to the benefit of the action, are bound to see that it is prosecuted to judgment, or it may be dismissed for want of prosecution, or compromised: see *Smith v. Doyle*, 4 A. R. 477; but, where the plaintiff has consented to a dismissal of the action, it may nevertheless be restored on the application of any other lien-holder, entitled under this *section*, except as to the claim of the original plaintiff, even though the dismissal may have taken place before judgment obtained: *McPherson v. Gedge*, 4 O. R. 246. A lien-holder thus intervening

must indemnify the original plaintiff against all costs, Section 32.
 past and future, and if he carry on the action in the
 name of the original plaintiff, he must also give the de-
 fendant security for his costs : *Ib.* But when the origi-
 nal plaintiff in the action has no right of action at all,
 other persons cannot intervene as lien-holders and get
 the benefit of the action : *In re Sear & Woods*, 23 O.
 R. 474.

After judgment, no action on behalf of a class can Action not to
be dismissed
after judg-
ment.
 properly be dismissed, even by consent of the plaintiff;
 the proper order in such a case is merely to stay the
 proceedings, but without prejudice to the rights of any
 other of the class entitled to the benefit of the action, to
 intervene and assume the conduct of the action; see
Arnbury v. Thornton, 6 P. R. 190, and it would seem
 that such is the proper order to make on any application
 to dismiss, by consent of plaintiff, an action brought to
 enforce a mechanic's lien, whether the application be
 made before, or after judgment. It was formerly doubt-
 ful whether any lien-holder, whose claim was not actu-
 ally payable at the time the action was commenced, could
 intervene and apply to carry on the action : see *Burrill*
v. Renihan, 25 Gr. 183 ; but see now *section 28*, and note
 (c) *ante*, p. 136.

Although the action is to be taken to be brought for
 the benefit of all other lien-holders on the same proper-
 ty, still there will be a saving of expense in naming as
 many of the lien-holders as are willing to join, as plain-
 tiffs in the action, as those who are not so named must
 be served with notice of trial : see *section 36, post* : and
 see *ante*, *section 31 (4)*.

Section 33.

Who may try
action to
enforce lien.

33. An action to enforce a lien may be tried by the Master in Ordinary, a Local Master of the High Court, an Official Referee, or a Judge of the County Court, in any county or judicial district in which the lands are situate (a) ; or by a Judge of the High Court of Justice at any sittings of that court for the trial of actions. 59 V. c. 35, s. 31.

(a) "**in which the lands are situate.**" It is not very clear whether these words are intended to limit the jurisdiction of all the officers previously enumerated in this *section*. It would seem probable that they are, and that the jurisdiction of the Master in Ordinary, Official Referees, and Local Masters, is intended to be confined to cases affecting lands situate within the County in which they respectively hold their offices. While these officers would thus appear to have a merely local jurisdiction, the Judges of the High Court of Justice, of course, have a jurisdiction in all cases co-extensive with the Province.

Section 34.

Powers of cer-
tain officers.

34. The Master in Ordinary, the Local Masters, Official Referees, and the County Judges, shall have, in addition to their ordinary powers, all the jurisdiction (a), powers and authority, of the High Court or a Judge thereof and of the said Master in Ordinary, to try, and otherwise completely dispose of,

an action to realize a lien, and all questions arising in such action, including the giving or refusing of the costs (*b*) hereinafter provided. 59 V. c. 35, s. 32 ; 60 V. c. 24, s. 7. Section 34.

(*a*) “**all the jurisdiction.**” The object of this *section* is to enable judicial officers trying actions to enforce mechanics' liens, to take and make all necessary accounts and inquiries and proceedings for completely working out the relief to which the parties are entitled, without the necessity of directing a reference to any other officer ; and it would seem that in the exercise of this jurisdiction they have power to grant an injunction, appoint a receiver, or grant any other ancillary relief, which may be necessary in order to dispose of any question arising in the action, at all events, so far as the enforcement of mechanics' liens is concerned.

(*b*) “**including the giving or refusing of the costs.**” The jurisdiction here conferred as to costs is a judicial discretion, and must be exercised in accordance with the settled principles of the Court. Usually where an “owner” is in no default, and has been guilty of no misconduct in the action or otherwise, and has not unnecessarily increased the costs, he is entitled to be paid his costs out of any moneys in his hands applicable to the payment of liens: *Hall v. Hogg*, 14 P. R. 45. But where an owner paid the amount found due by him into Court pursuant to the order of the Court, it was held that he had no longer any right to be recouped thereout the costs of an unsuccessful appeal by a contractor which he was unable to recover from the latter :

Section 4 *Patten v. Laidlaw*, 26 O. R. 189 : but if the owner had any equitable right to be recouped out of the money if he had retained it in his hands, *quære*, whether the fact that he had, in obedience to the order of the Court, paid it into Court, ought to deprive him of that right so long as the Court had possession of the fund, for *actus curiæ non nocet*.

The costs of the plaintiff of the action ought ordinarily to be first paid out of any moneys recovered in the action, and also the costs of other lien-holders of proving their claims : *Hall v. Hogg*, 14 P. R. 45. The costs of lien-holders are to be allowed according to the scale applicable to the amount found due to them respectively : *Id.*

Where the plaintiff makes an unsuccessful claim to relief, ordinarily, he will be directed to pay personally the costs so occasioned, and will not be permitted to charge them against any fund recovered in the action as against other parties interested.

A mortgagee in no default, as against whom relief is granted under section 7 (3), is usually entitled to his costs from the owner if in default, and if the owner is not in default then to have them added to his claim. He is not entitled to costs against the plaintiff, except in so far as the latter fails to establish his claim to relief as against him.

The amount of costs which may be awarded in the action, is subject to the limitation prescribed by sections 41, 42, and 43, *post*.

Section 35.
Appointing
day for trial.

35. (1) After the delivery of the statement of defence (a) where the plaintiff's

Section 35.

claim is disputed, or after the time for delivery of defence in all other cases where it is desired to try the action other than at the ordinary sittings of the High Court, either party may apply to a Judge or other officer (b) who has the power to try the action, to fix a day for the trial thereof, and the said Judge, or other officer, shall give an appointment fixing the day and place of trial, and on the day fixed, or on such other day to which the trial may be adjourned, shall proceed to try the action (c), and all questions which arise therein, or which are necessary to be tried, to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him or upon whom the notice of trial has been served, and at the trial he shall take all accounts, make all inquiries, and give all directions, and do all other things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action or at the trial, and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action or who have been served with the notice of trial, and shall

Trial.

Section 35. embody all the results in the judgment (Form 13).

Estate may be sold.

(2) The Judge or officer who tries the action may order that the estate or interest charged with the lien may be sold, and when, by the judgment, a sale is directed of the estate or interest charged with the lien, the Judge or officer who tries the action may direct the sale to take place at any time (*d*) after judgment, allowing, however, a reasonable time for advertising such sale.

Sale of materials.

(3) The Judge or officer who tries the action may also direct the sale of any materials (*e*) and authorize the removal thereof.

Letting in lien-holders who have not proved their claims at trial.

(4) Any lien-holder, who has not proved his claim at the trial of an action to enforce a lien, on application to the Judge, or officer who tried the action, on such terms as to costs and otherwise as may be just, may be let in to prove his claim at any time before the amount realized in the action for the satisfaction of liens has been distributed (*f*), and where such a claim is proved and allowed the Judge or officer shall amend the judgment so as to include such claim therein.

(5) Any lien-holder for an amount not exceeding \$100, or any lien holder not a party to the action, may attend in person (*g*) at the trial of an action to enforce a lien, and on any proceedings in such action, or may be represented thereat or thereon by a solicitor or by an agent who is not a solicitor.

Section 35.
Right of lien-holders to attend at trial.

(6) When a sale is had the Judge or officer with whose approbation the lands are sold shall make a report on the sale (*h*) and therein direct to whom the moneys in court shall be paid, and may add to the claim of the person conducting the sale his actual disbursements incurred in connection therewith, and where sufficient to satisfy the judgment and costs is not realized from the sale, he shall certify the amount of the deficiency and the names of the persons, with their amounts, who are entitled to recover the same, and the persons by the judgment adjudged to pay the same, and such persons shall be entitled to enforce the same by execution or otherwise as a judgment of the court. 59 V. c. 35, s. 33.

Report where sale is had.

(a) "After the delivery of the statement of defence." As before remarked, it appears to be intended that no

Section 35. formal appearance need be entered but that the defendant may, without any preliminary, file a statement of defence ; or may content himself with entering an appearance, without filing any defence.

(b) “ **may apply to a judge or other officer.**” It was held by Street, J., in *Pilkington v. Broken*, 28th March, 1898, that the application must be made on notice to the parties named as defendants ; and that where the application is made to the Master in Ordinary, his Chief Clerk has no power to act in his place ; and that the officers empowered to try actions to enforce liens, have no power to delegate their authority.

As to the officers empowered to try actions to enforce mechanics' liens : see *supra*, section 33.

(c) “ **shall proceed to try the action.**” Two modes of trying lien actions are indicated by this *section*,—(1) either the plaintiff may carry the action down for trial at the ordinary sittings, for trial in the usual way, or,—(2) either party may apply to a judge, or any of the officers mentioned in *section* 33, for an appointment to try the case at some special time to be fixed for the purpose. It is, however, improbable that any judge of the High Court will consent to try such actions otherwise than at the usual sittings for trial. Where the first course is pursued notice of trial will have to be given, and the case entered for trial, as in other cases in the High Court. Where this mode of trial is adopted it does not appear probable that a judge of the High Court will try the action in the manner indicated in the subsequent part of this *section*, and a reference will probably be directed as

formerly to a Master to take the accounts and make the necessary inquiries, and sell the property for the purpose of realizing the liens, and if that course is adopted, subsequent incumbrancers should not be made original defendants, but the Master would add them as parties in his office according to the usual practice : see *Con. Rule* 746 ; *Cole v. Hall*, 13 P. R., 100. Section 35.

Where the second course is adopted, it appears to be the intention of the Act that the trial shall be a sort of combined trial and reference rolled into one. It does not appear to be intended that the officer shall merely determine the preliminary question whether the plaintiff has a lien as alleged, and then direct a reference to himself, or some other functionary, to take accounts, etc., but he is apparently intended himself to determine whether the plaintiff has or has not a lien, and if he finds he has, then he is to proceed to try all the preliminary questions, and to ascertain whether there are any other liens or incumbrances on the property in question, and to take accounts of what is due to the plaintiff and other lien-holders and incumbrancers. As regards mechanic lien-holders, they are to be served with notice of trial, and presumably are to be prepared to prove their claims at the trial. As regards other incumbrancers, who, according to the practice in ordinary actions are not original parties, but are added after judgment as parties in the Master's Office, no express provision is made for adding them as parties before, or after, the trial, but they are required to be notified of the trial, it would, therefore, seem to be necessary that they should be made original parties, and served with notice of trial before the accounts can properly be taken ; and if they are not made parties

Section 35. before the trial, it would appear to be necessary that the trial should be adjourned to enable them to be added as parties and served with notice of trial.

Where the action is tried pursuant to a special appointment, the result of the trial and of the various accounts and inquiries are all to be embodied in the judgment. See Form No. 13.

In such cases it would seem necessary for a plaintiff at the trial to be prepared to produce the registrar's and sheriff's certificates for the purpose of showing who are the incumbrancers on the property in question, and who are entitled to notice of the proceedings.

Sale of land. (d) "**may direct the sale to take place at any time.**" A month was formerly allowed for payment of the amounts found due, before the sale; and the same time will still be usually allowed, unless the owner consents to a sale at an earlier period; or some special reason is shown for giving a shorter time for payment.

Sale of materials. (e) "**may also direct the sale of any materials**" In the R. S. O. (1887) c. 126, s. 30, the word "machinery" was used instead of "materials." The latter word is, of course, a wider and more general one, and would include not only "machinery," but all kinds of moveable property. See *ante*, section 2 (5). Materials which have been affixed to the freehold cease to be moveable property.

Notwithstanding the generality of the words "any materials," materials which are not subject to the claim of the lien-holder, could not be ordered to be sold, or

removed under this *section* Neither is it probable that the jurisdiction hereby conferred would be exercised, except in cases where it would be for the general benefit of all parties interested that the materials should be sold apart from the land.

Section 35.

(f) “**has been distributed.**” These words probably mean an actual distribution and payment of the money to the parties, or to some of those entitled, and not merely the making of a report fixing the amount to be distributed. The concluding words providing for the amendment of the report show that the *section* contemplates the making of the application to be let in, after a report fixing the distribution has been made. A difficulty might arise where part of the money has been paid, and part still remains in the custody or control of the Court ; for there is no provision for compelling any lienholder who has been paid his distributive share to refund any part of it in order to satisfy a new claimant, and if the Court were to undertake a redistribution some lienholders would be paid more in proportion to their claims than others. Should a claimant be let in under such circumstances, it would seem only equitable that, in any case, the redistribution of the balance should not prejudice the other parties to any greater extent than would have been the case had the claimant proved his claim before the making of the original report. And moreover, this *sub-section* does not seem to contemplate that a claimant coming in after the proper time should be allowed to disturb any distribution of any part of the proceeds which has actually been carried into effect prior to the making of his application. The form of notice of

Section 35. trial (No. 10) states that if the person on whom it is served does not appear and prove his claim or defence he may be deprived of all benefit of the proceedings. There is no *section* of the statute expressly stating that this is to be the effect of non-appearance, or of non-proof of claim, or defence, but, in the ordinary course of the Court, that would appear to be the necessary result, otherwise there would be no finality to the proceedings. The form of judgment (No. 13) given in the Schedule contains a clause (par. 7) barring non-appearing parties.

(g) “**may attend in person.**” Every suitor has the right to appear in any Court in person, and it is not at all probable that this *sub-section* is intended in any way to restrict that right to lien holders for \$100 or less; the really important part of the *sub section* appears to be the concluding clause entitling such lien holders to be represented by agents who are not solicitors, this is merely extending to the High Court a right which suitors in Division Courts are entitled to exercise: R. S. O., c. 60, s. 126.

(h) “**report on the sale**” The report on sale here referred to is to be in the form of similar reports in other actions, and must be duly confirmed, before it can be acted on: see *Con. Rule* 769.

And before the purchase money can be paid out of Court it is necessary to produce to the Accountant evidence that the purchaser consents to the payment out, or that he has accepted a conveyance or vesting order: *Con. Rule* 743.

In addition to the ordinary matter contained in a report on sale, it seems to be contemplated that the report

shall also state the result of the officer's findings on the other matters mentioned in this *sub-section* : viz , the subsequent account of the various claims, the costs of the sale, and the amount of the deficiency, if any, on each claim after deducting the proportion of purchase money payable to each claimant. The Master's certificate of the amount of the deficiency is by this *sub-section* made equivalent to a judgment of the Court for the amount thereof, and it may be enforced in like manner as a judgment.

Section 35.

36. The party obtaining an appointment(*a*) fixing the day and place of trial shall, at least eight clear days (*b*) before the day fixed for the trial, serve a notice of trial which may be in Form 10 in the schedule to this Act, upon the solicitors for the defendants who appear by solicitors, and on all lien-holders who have registered their liens (*c*) as required by this Act, or who are known to him, and on all other persons having any charge or incumbrance (*d*), or claim on the said lands, who are not parties, or who, being parties, appear personally in the said action, and such service shall be personal unless otherwise directed by the Judge or officer who is to try the case, who may, in lieu of personal service, direct in what manner the notice of trial may be served. 59 V. c. 35, s. 34.

Section 36.

Notice of trial, and service of.

Section 36.

(a) "**The party obtaining an appointment.**" These words seem to indicate that this *section* is only intended to apply to cases intended to be tried under *section* 35, otherwise than at the ordinary sittings for trial of the High Court.

(b) "**at least eight clear days.**" Both the day of service and the day of trial are to be excluded from the eight days. The ordinary practice requires 10 days : see *Con. Rule* 538.

(c) "**who have registered liens**" The plaintiff, or his solicitor, must be careful to ascertain the names and addresses of all persons who have registered liens on the property in question. Formerly, under the Act of 1887, in an action to enforce a mechanic's lien, only lien-holders of the same class as the plaintiff were entitled to the benefit of it, unless expressly named in the writ ; but under the present Act, all lien holders on the same property, whether of the same class as the plaintiff or not, are to be brought in. Unless all persons entitled to notice of trial are duly served the trial may have to be postponed and delay and expense thereby incurred, and any extra costs thus occasioned would probably have to be borne by the plaintiff personally, and would not be recoverable against the property subject to his lien.

Other lien holders, etc., how ascertained.

In order to ascertain who are the other lienholders who should be served with the notice of trial, a search must be made in the proper Registry Office, or Land Titles Office, for all liens registered up to the commencement of the action and not then expired by effluxion of time ; it is not, however, necessary to

search whether any other actions have been commenced, as such other actions could only have the effect of keeping alive liens in those particular actions : see *Grainger v. Grainger*, 1 Chy. Ch. R. 241 ; but see *Bunting v. Bell*, 23 Gr. 584.

Section 36.

Formerly where a lien-holder, after the institution of a suit in which he could have proved his claim, unnecessarily commenced another action to enforce his lien, he could not recover the costs of such second action in that first commenced : *Henry v. Bowes*, 3 C. L. T. 606.

Costs of action
by other
lien-holder.

(d) “**having any charge or incumbrance.**” Not only persons having mechanics' liens on the property, but all persons having any charge or incumbrance thereon, are to be notified of the trial ; but this must mean only such chargees or incumbrancers whose claims are subsequent to that of the plaintiff. Whether subsequent incumbrancers are intended to be made parties, or merely to be served with notice of trial, and thereby bound by the proceedings, is not very clear ; until it is otherwise decided, it would seem safer to make them original defendants wherever the action is to be tried in the second manner provided for by section 35. Prior chargees or incumbrancers can only be brought in to the proceedings for the purpose of redeeming them, or for obtaining relief under section 7 (3). Where prior mortgagees or chargees are improperly brought before the Court, the plaintiff may probably be ordered to pay the costs of their appearance.

In any case it would seem necessary that all persons, whether they be incumbrancers or other lien-holders,

Section 36. — against whom any relief is claimed, should be named as original defendants and served with the statement of claim, or writ, when the action is commenced by writ : see *Bank of Montreal v. Haffner*, 10 A. R. 592 ; *S. C. sub nom. Bank of Montreal v. Worswick*, Cass. Dig. 289 ; but it was held under the former Act (1887) that it was not necessary to make other lienholders original defendants merely for the purpose of enabling the plaintiff to dispute their *status* as lien-holders : *Hall v. Hogg*, 14 P. R. 45 ; *Hall v. Pilz*, 11 P. R. 449 ; see *Cole v. Hall*, 13 P. R. 100 ; but there was no provision in that Act, similar to that in section 35, for the final disposition of the whole case at the trial ; and those cases could not, therefore, be relied on, where this method of trial is followed.

Section 37. **37.** When more than one action is brought to realize liens in respect of the same property, a Judge or other officer having power to try such actions, may, on the application of any party to any one of such actions, or on the application of any other person interested, consolidate all such actions into one action (*a*), and may give the conduct of the consolidated action to any plaintiff he sees fit. 59 V. c. 35, s. 35.

Consolidation of actions

(*a*) “consolidate all such actions into one action.” Where an order is made under this *section* for the consolidation of several actions, all the future proceedings

should be entitled in the several actions thus consolidated. Section 37.

What are called "Orders for consolidation of suits" are made in different ways. Sometimes all the proceedings in the several actions, except one, are stayed, and the parties in the actions which are stayed are ordered to be made parties in the action which is to proceed; sometimes the order simply directs all future proceedings in the several actions to be carried on concurrently: and sometimes it directs that the result of one action shall determine the result in the other actions.

The "consolidation" referred to in this *section* is the reduction of the several actions to one, to which all the parties to the several actions become parties: see further as to the consolidation of actions, *Con. Rule*, 435, and notes in *Holmsted & Langton*, p. 602 *et seq.*

38. Any lien-holder entitled to the benefit of the action (*a*) may apply for the carriage of the proceedings, and the Judge, or any other officer having power to try the action, may thereupon make an order giving such lien-holder the carriage of the proceedings, and such lien-holder shall for all purposes thereafter be the plaintiff in the action. Section 38.
Transferring carriage of proceedings. 59 V. c. 35, s. 36.

Section 38.

(a) "Any lien-holder entitled to the benefit of the action." Ordinarily in a class suit the plaintiff is *dominus litis* until judgment, and the action may, by his consent or default, be compromised, or dismissed: see *Smith v. Doyle*, 4 A. R. 477; but in actions to enforce mechanics' liens a different rule prevails, and it has been held that even after an action has been dismissed before judgment, on the original plaintiff's consent, it may nevertheless be reinstated on the application of some other lien-holder: *McPherson v. Gedge*, 4 O. R. 246; but where the original plaintiff had no *locus standi* at all to bring the action, it has been held that other persons claiming liens cannot intervene to get the benefit of it: *In re Sear & Woods*, 23 O. R. 474.

The other lien-holders entitled to the benefit of an action are all those having mechanics' liens on the property in question: see section 32, *ante*, and it is no longer necessary that they should be of the same class as the plaintiff, as was the case under former Acts.

Where another lien-holder applies for, and obtains the carriage of the proceedings, it would seem proper to require him to indemnify the original plaintiff against any future costs: see *Patterson v. Scott*, 4 Gr. 145; *McPherson v. Gedge*, *supra*.

Section 39.

Where judgment of court of first instance to be final.

39.—(1) In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is \$100 or less (a), the judgment shall be final (b), binding, and without appeal, except, that the Judge or officer who tried the same may, upon application

within fourteen days after judgment is pronounced, grant a new trial. 59 V. c. 35 s. 38 ; 60 V. c. 24, s. 9. Section 39.

(2) In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is more than \$100 (*c*) and not more than \$200, any person affected thereby may appeal therefrom to a Divisional Court (*d*), whose judgment shall be final and binding on the appellant, but the respondent may appeal therefrom to the Court of Appeal, whose judgment shall be final and binding on all parties. 60 V. c. 15, Sched. A (77) ; c. 24, s. 10, (1). Where appeal to Divisional Court final.

(3) In all other cases an appeal may be had in like manner and to the same extent as from the decision of a Judge trying an action in the High Court without a jury (*e*). 60 V. c. 24, s. 10 (2). Appeal in other cases.

(a) "where the total amount of the claims of the plaintiff and other persons claiming liens is \$100"

A judgment to enforce a mechanic's lien is of a composite character and may be regarded as several judgments combined ; inasmuch as the adjudication in favour of each claim constitutes a judgment in favour of the claimant. This *section* must be read, how-

Section 39.

ever, in reference to the judgment as a whole, and it only applies where the aggregate amount of claims is \$100 or less, and has no application where the aggregate amount of claims is more than \$100 even though the several claims included in the judgment may be each of them less than \$100.

(b) "**shall be final.**" These words make the decision of the Judge or Officer who pronounces the judgment in the cases to which the *section* applies unappealable, and also irreversible, except perhaps, upon application to himself for a new trial.

(c) "**is more than \$100**" See note (a) *supra*. Under this *sub-section*, if the aggregate amounts of the claims exceed \$100 then it would seem that an appeal to a Divisional Court might be had as to any of the claims included therein, even though individually less than \$100. It must be noted that in this *section* the right of appeal is regulated by the aggregate amount of claims, and not by the aggregate amount of the judgment, so that where the aggregate amount of the claims exceeds \$100 it would be possible for an appeal to be had to the Divisional Court in respect of any claim under \$100 allowed or disallowed, and as to which no appeal would lie if it were the only claim in question in the action. If a respondent who fails before a Divisional Court appeals, he must give security for the costs of such appeal, unless otherwise ordered: *Con. Rule 826*; *Sherlock v. Powell*, 18 P. R. 312.

The word "extend" in this *sub-section* is obviously a misprint for "extent."

(d) "**a Divisional Court.**" The Court here referred to is a Divisional Court of the High Court of Justice. Except during vacation and holidays the Court meets on

the first Monday of every month, and continues its sittings from day to day for 2 weeks, or longer, (Saturdays and holidays excepted) as the business before it may require: *Con. Rule 116.* Section 39.

No time limit is laid down by the Act for regulating appeals under this *section*: but it would seem probable that they are intended to be governed by *Con. Rule 787.*

Cases should be set down for the first Monday in the month, and they will then be entered on the cause list for that month, and will be placed on the peremptory list for hearing in due course.

(e) "**as from the decision of a Judge trying an action in the High Court without a jury.**" The right of appeal in such cases is regulated by *The Judicature Act*, s. 75 (1); and *Con. Rule 787.*

The appeal lies to either the Divisional Court of the High Court, or to the Court of Appeal, at the election of the appellant, but if unsuccessful no further appeal lies. If the appeal be taken to the Divisional Court and is successful, the respondent may appeal to the Court of Appeal, and if the appeal be taken in the first instance to the Court of Appeal, and is successful the respondent is entitled to an appeal therefrom to the Supreme Court, provided the amount involved is sufficiently large: see *The Supreme and Exchequer Court Act*, (R. S. C. c. 135,) and amendments thereto, (see ss. 24, 28): *Cass. Pr.* 14-17.

40. No fees in stamps or money (a) shall be payable to any Judge or other officer in Section 40.
Limit of fees
in money or
stamps.

Section 40.

any action brought to realize a lien under this Act, nor on any filing, order, record or judgment, or other proceeding in such action, excepting that every person other than a wage-earner shall, on filing his statement of claim where he is a plaintiff, or on filing his claim where he is not a plaintiff, pay in stamps one dollar on every one hundred dollars, or fraction of one hundred dollars, of the amount of his claim up to one thousand dollars. 59 V. c. 35, s. 37. 60 V. c. 24, s. 8.

(a) "**No fees in stamps or money.**" This *section* virtually abrogates the provisions of *Con. Rule 1179*, as regards actions to enforce mechanics' liens, and introduces an entirely different method of payment of the fees of Court in such actions, viz., a percentage on the amount claimed, whether by the plaintiff, or any lienholder, incumbrancer, or chargee, brought into the proceedings, whether as an original party, or otherwise.

A defendant not having any claim is virtually exempted from the payment of any fees of Court for any proceeding in the action. The highest amount any plaintiff or claimant can be called on to pay is \$10. The fees payable by a plaintiff are to be paid on filing his statement of claim; and by other claimants on filing their claims. The fees payable by a plaintiff, or defendant appear to be regulated by the amount claimed, and not by the amount allowed.

See a further provision as to fees, *section 46 (2), post*, p. 175.

Section 41.

Limit of costs
to plaintiff.

41. The costs of the action (*a*) under this Act awarded by the Judge or officer trying the action, to the plaintiffs and successful lien-holders (*b*) shall not exceed in the aggregate an amount equal to twenty-five per cent. of the amount of the judgment (*c*) besides actual disbursements, and shall be in addition to the amount of the judgment, and shall be apportioned and borne (*d*) in such proportion as the Judge or other officer who tries the action may direct. 59 V. c. 35, s. 41.

(*a*) "**The costs of the action.**" The costs here referred to are simply the compensation to the solicitors, and do not include the fees of Court, or other disbursements. The amount of the fees of Court are regulated by *section 40, ante*. In addition to the costs of the action a sum may also be allowed for drawing and registering the lien, or vacating the registration of the lien, of each lien-holder : see *post, section 44*.

(*b*) "**to the plaintiffs and successful lien-holders.**" This *section* deals only with the costs to be awarded to successful lien-holders. It is silent as to the costs of persons who are neither plaintiffs, nor successful lien-holders,—*e g.*, incumbrancers, or owners not in default. These latter would, when awarded costs, apparently, in the absence of any provision to the contrary, be entitled to have their costs taxed as in ordinary actions, except so far as the matter is provided for by the next *section*.

Section 47. (c) "**the amount of the judgment.**" These words are somewhat ambiguous ; they may refer to the aggregate amount of the claims allowed to the plaintiff, and all other claimants, or the amount of the plaintiff's claim only, or the amount to be recovered out of the property in question for the benefit of the plaintiff and other lien-holders, as distinguished from that part of their claims, if any, which is recoverable against their respective primary debtors personally.

Limit of costs
to plaintiff.

It is impossible to say what may be determined to be the true construction. So far as the costs are to be paid by the owner, it would seem that the amount which he is found by the judgment to be liable to pay, ought to be deemed "*the amount of the judgment*" for the purpose of fixing the costs ; on the other hand, many cases will arise in which the amount which the owner is liable to pay, will be quite insufficient to pay the claims of the plaintiff and other lien-holders, and for which they will be entitled to judgment as against their primary debtors (see *section 47*), and as against whom the larger sum will be "*the amount of the judgment.*" How these conflicting rights may be reconciled it is hard to conjecture, and all that can be done, therefore, is to point out the difficulty ; see next note.

(d) "**shall be apportioned and borne**" These words seem to be sufficiently wide to enable the Judge or Officer trying the action to exercise an equitable discretion in fixing the costs, and to admit of his treating "*the amount of the judgment*" for the purpose of fixing the costs as against the owner, and the primary debtors of the lien holders, in different ways. Thus he would seem

to have power to fix the costs as against the owner by reference to the amount he is found liable for ; and, in case of there being a deficiency, he might, as against the primary debtors, award a further sum for costs to be regulated by the amount of such deficiency.

Section 41.
—

In apportioning the costs, regard will no doubt be had to the amount of work in the conduct of the litigation which has been performed by the various parties claiming costs.

A somewhat similar plan of awarding costs has prevailed in administration, and partition actions : see *Con. Rules* 1146.

42. Where the costs are awarded against the plaintiff or other persons (*a*) claiming the lien, such costs shall not exceed an amount in the aggregate equal to twenty-five per cent. of the claim of the plaintiff and other claimants (*b*), besides actual disbursements, and shall be apportioned and borne (*c*) as the Judge or said other officer may direct. 59 V. c. 35, s. 42.

Section 42.
—
Limit of costs to be awarded against plaintiffs.

(*a*) "**against the plaintiff or other persons.**" The previous *section* deals with the costs to be allowed to successful parties, and the present *section* deals with costs to be awarded against unsuccessful parties, whether they be plaintiffs, or other persons claiming liens.

(*b*) "**the claim of the plaintiff and other claimants.**" It is possible that these words are intended

Section 42. to be read collectively or distributively according to the circumstances of each case. If the claims of the plaintiffs and all persons claiming liens fail, and all are found liable to pay costs, then the words are to be read collectively and the costs are to be estimated on the aggregate amount of the claims; but in awarding by whom they are to be paid, probably the apportionment will be made on the basis of each person's claim as to which he failed: on the other hand, if some only fail to make out a claim, and costs are ordered to be paid by the persons thus failing, then it would seem that it will only be the aggregate amount of the claims as to which the failure arises, which can be used as the basis for estimating the amount of costs payable by them. In other words, where a lien-holder for a claim of \$10 fails to make out his claim, he is not to be visited with costs on the basis of the claims actually proved, but only on the basis of his own claim as to which he has failed. Where there are other lien-holders, besides the plaintiff, on the property in question, entitled to the benefit of the action, but who do not make any claim, they cannot be ordered to pay any costs, because the plaintiff fails to make good his claim. Where a lien is ordered to be vacated, in addition to the costs allowed by this *section*, a further sum may be allowed for the vacating the registration of the lien: see *section 44, post*. In the absence of judicial decisions interpreting these *sections*, it must, of necessity, be, more or less, a matter of conjecture what their true meaning may be.

(c) "**shall be apportioned and borne.**" It has been already intimated, that where costs are awarded against

the plaintiff or other persons claiming liens, such costs will probably be ordered to be borne by the plaintiff and others according to the amounts of their respective claims. Section 42.

43. In case the least expensive course is not taken by a plaintiff under this Act, the costs allowed to the solicitor shall in no case exceed what would have been incurred if the least expensive course had been taken. Section 43.
Costs where least expensive course not taken. 59 V. c. 35, s. 43.

See *Con. Rules* 1175; *Holmsted & Langton*, p. 1290.

44. Where a lien is discharged or vacated under section 27 of this Act or where in an action, judgment is given in favour of or against a claim for a lien, in addition to the costs of an action (*a*), the Judge or other officer may allow a reasonable amount (*b*) for costs of drawing and registering the lien or for vacating the registration of the lien. Section 44.
Costs of drawing and registering and vacating registration of lien. 60 V. c. 24, s. 11 (2).

(*a*) "**the costs of an action.**" The costs of an action are provided for by *sections* 41, and 42, *ante*. The costs provided for by this *section*, it is expressly stated, are to be allowed in addition to the costs provided for under those *sections*.

Section 44. (b) "**a reasonable amount.**" These words seem to indicate that the costs are not necessarily to be allowed according to the tariff of fees prescribed by the Supreme Court of Judicature, but are to be regulated in amount by the discretion of the officer, and where the amount of the lien is insignificant, the costs awarded for its discharge will probably be allowed at a correspondingly small sum : whereas in cases where the amount claimed is large, probably the ordinary taxable charges may be allowed.

Section 45.
Costs not
otherwise
provided for.

45. The costs of and incidental to all applications and orders made under this Act and not otherwise provided for shall be in the discretion of the Judge or officer to whom the application or order is made. 60 V. c. 2 , s. 11 (1).

See *sections* 41, 42, 44, 46 (2).

Section 46.
Payments out
of court.

46.—(1.) Excepting in actions tried by a Judge (a) of the High Court the Judge or other officer who tries the action shall, where money has been paid into court and the time for payment out arrives, forward a requisition for cheques (b) with a certified copy of his judgment, and (when one is made) of the report on sale, to the Accountant of the Supreme Court of Judicature who shall, upon receiving the said requisition and copy of the judgment and report (if any) make out and

return to the said Judge or officer cheques for the amounts payable to the persons specified in the requisition, and the said Judge or officer on receipt of said cheques shall distribute them to the persons entitled. 59 V. c. 35, s. 45 : 60 V. c. 24, s. 12. Section 40.
—

(2) No fees or stamps (*c*) shall be payable on any cheques or proceedings to pay money into court or obtain money out of court, in respect of a claim of lien, but sufficient postage stamps to prepay a return registered letter shall be enclosed with every requisition for cheques. 59 V. c. 35, s. 46 : 60 V. c. 24, s. 13. Fees not to
be payable on
payments out
of court.

(a) “**Excepting in actions tried by a Judge.**” This exception removes from its operation, all mechanics’ lien actions which are tried before a Judge of the High Court, and only actions tried before any Judge of a County Court, or any of the officers mentioned in *section 33, ante*, are within its provisions. In cases not included in this *section* the cheques will have to be issued on application to the Accountant as in ordinary cases.

(b) “**forward a requisition for cheques.**” The officer forwarding the requisition is also to send the necessary postage stamps for the pre-payment of the postage and registration of the letter enclosing the cheques : see *sub section 2, supra*. No fees of court are payable on the cheques : *Ib.*

Section 46.

(c) "**No fees or stamps.**" By *section 40, ante*, the fees in stamps or money payable in actions to enforce liens are limited to a lump sum, and in view of that provision, this *sub-section* so far as it dispenses with the payment of fees or stamps on cheques, etc., seems superfluous.

Section 47.

Form of
judgment in
favour of
lien-holders.

47. All Judgments in favour of lien-holders shall adjudge that the person or persons personally liable for the amount of the judgment (*a*), shall pay any deficiency (*b*) which may remain after sale of the property adjudged to be sold, and whenever on a sale of any property to realize a lien under this Act sufficient to satisfy the judgment and costs is not realized therefrom, the deficiency may be recovered by execution against the property of such person or persons. 59 V. c. 35, s. 47.

(a) "**persons personally liable for the amount of the judgment.**" This means the persons with whom the contracts of the respective lien holders were made under which the liens are claimed.

(b) "**shall pay any deficiency.**" This *section* does not give the lien-holders a right to judgment and execution against their respective debtors in the first instance, but only a right to a judgment for the payment of the deficiency which may remain due to them after the

application of whatever may be realized from the lien. Their rights of lien must therefore be first exhausted by the realization of the property subject to the lien, before the lien-holders are in a position to issue execution under the provisions of this *section* against their primary debtors: see *per* Rose, J., *Weatherdon v. Robinson*, Q B.D., 23 Mar., 1888. But this in no way impairs the right of any lien-holder to abandon his claim to a lien and sue for and recover, if he can, his claim by judgment and execution in the ordinary way.

Section 47.

48. Whenever in an action brought under the provisions of this Act any claimant shall fail (a) for any reason to establish a valid lien he may nevertheless recover therein a personal judgment (b) against any party or parties to the action (c) for such sum or sums as may appear to be due to him and which he might recover in an action on contract against such party or parties. 59 V c. 35, s. 48.

Section 48.

Personal judgment when claim for lien fails.

(a) "shall fail" This *section* only authorizes a personal judgment where the claimant of a lien fails to establish his lien. The only other provision for obtaining a personal judgment against the debtor is to be found in the preceding *section* which only provides for a judgment being awarded for the deficiency, which may remain after the realization of the lien.

(b) "recover therein a personal judgment." This *section* contemplates the possibility of the claimant of a

Section 48.

lien failing to establish any right to a lien, and that though he may fail as to the lien he may nevertheless be entitled to recover a judgment against his debtor for the debt; of course, such a judgment cannot be awarded unless the debtor is a party to the proceedings. Cases may arise where an action is brought to enforce a lien, and sub-contractors may come in claiming liens, whereas those through whom they claim may not have registered any lien, and, consequently, may not be served with notice of trial by the plaintiff under *section 36*; and the Act is silent as to the mode of bringing such parties before the Court; but it clearly will not be possible for the Court to pronounce a judgment in favor of a claimant under this *section* unless the debtor is in some way or other made a party to the proceedings. Where the Act provides no special procedure for adding parties, it may perhaps be, not unreasonably, presumed, that the ordinary procedure for adding parties prescribed by the *Con. Rules* will have to be resorted to by any claimant seeking to recover a judgment under this *section*. The procedure prescribed by the Act is anomalous and it will require the aid of judicial exposition to develop it.

(c) "**against any party or parties to the action.**" These words make clear what has been stated in the preceding note as to the necessity of the debtor against whom the personal judgment is claimed being a party to the action.

Section 49.
Forms

49. The forms in the Schedule hereto, or forms similar thereto or to the like effect (a), may be adopted in all proceedings under this Act. 59 V, c. 35, s. 49.

(a) “**or to the like effect.**” These words permit a certain degree of latitude in the use of the forms, and while those prescribed should as far as possible be followed, yet in cases not provided for thereby, or in which some deviation therefrom becomes necessary in order to effectuate the rights of parties, then such alterations in the forms as may be necessary, may be made without in any way invalidating the proceedings; but in case of any such deviation it will be necessary, particularly in a registered claim of lien, to insert nevertheless in the form all those particulars which the prescribed form contains, otherwise it may invalidate the proceeding: see *Wallis v. Skain*, 21 O. R. 532; before a claim can be invalidated by reason of non-compliance with the prescribed form, however, it will now be necessary for the Judge or Officer who tries the case to be satisfied that “the owner, contractor, or sub-contractor, mortgagee, or other person, as the case may be,” is prejudiced thereby: see *section 19, ante* p. 103.

Section 49.

50. This Act shall not apply to liens arising before the 7th day of April, 1896, excepting that where no action has been commenced or proceeding instituted to realize a lien arising before the said day the procedure herein directed shall be adopted to realize the same. 59 V. c. 35, s. 50.

Section 50.

Liens arising
before Act
comes into
force.

51.—(1) Every mechanic or other person who has bestowed money or skill and mate-

Section 51.

Mechanics
entitled to

Section 51.

lien on a chattel may sell the chattels if (after three months) payment is not made.

rials upon any chattel or thing in the alteration and improvement in its properties or for the purpose of imparting an additional value to it so as thereby to be entitled to a lien (*a*) upon such chattel or thing for the amount or value of the money or skill and materials bestowed, shall, while such lien exists (*b*), but not afterwards, in case the amount to which he is entitled remains unpaid for three months (*c*) after the same ought to have been paid (*d*), have the right in addition to all other remedies provided by law, to sell by auction the chattel (*e*) or thing in respect of which the lien exists, on giving one week's notice (*f*) by advertisement in a newspaper published in the municipality in which the work was done, or in case there is no newspaper published in such municipality, then in a newspaper published nearest thereto, stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last known place of residence (if any) of the owner, if he be a resident of such municipality.

(2) Such mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him (*g*) and the costs of advertising and sale, and shall upon application pay over any surplus (*h*) to the person entitled thereto. 59 V. c. 35, s. 51.

Section 51.

Application of proceeds of sale.

(a) "so as thereby to be entitled to a lien." At common law there are two kinds of liens on chattels, viz.: general liens, and particular liens. A general lien is a right to retain a chattel not merely for work or money expended on the specific chattel retained, but also for the general balance of account due by the owner to the lien-holder. A particular lien is the right to retain a chattel for the work or money expended on it. At common law, the lien of a mechanic on chattels, independent of any contract express or implied, is particular, and not general: *Phillips*, ss. 470, 471. The right of particular lien exists when there is no agreement to the contrary, in every case where a bailee for hire has, by his labour and skill, or by the use of any instrument over which he has control, imparted additional value to the goods of another: see *Cross on Lien*, 24; *Phillips*, s. 474; *Jackson v. Cummins*, 5 M. & W. 342.

Nature of liens on chattels at common law.

General lien

Particular lien.

A shipwright is entitled to a lien on a ship for repairs: *Franklin v. Hosier*, 4 B. & Ald 341: and so is an engineer, for engines and boiler furnished by him to a vessel: *Ex p. Willoughby*, 16 Ch. D. 604; 44 L. T. 111; and a trainer on a horse for training it: *Reilly v. McIlmurray*, 29 O. R. 167.

Section 51.

Act confined
to particular
liens.

The Act is confined to the case of particular liens, and only authorizes a sale for the satisfaction of claims for money, work, or materials bestowed in the alteration and improvement of the particular chattel sold. It does not authorize the sale of chattels to enforce a general lien existing thereon.

Duration of
lien.

(b) "**while such lien exists.**" The lien exists only so long as the lien holder retains possession of the chattel, and his claim for work and materials bestowed thereon is unpaid. The parting with possession is a surrender of the right of lien, even though the claim remain unpaid; and so also is the release of the debt, even though the possession of the chattel be retained. The possession must be continuous. Thus, where a mechanic had repaired a carriage and allowed it to remain in his yard, but the owner had frequently taken it out of the yard, and returned it; it was held that the mechanic could not afterwards retain it for the amount of the repairs: *Hartley v. Hitchcock*, 1 Starkie, 408. But, where A. sent a waggon to B. to make certain wood-work therefor, and B., having finished the wood-work, sent the waggon in A.'s name to another mechanic to do the iron-work, and subsequently got back the waggon, and upon A.'s calling for the waggon, allowed him to remove the box to the highway; but, on his returning for the running part, refused to let it go until he was paid his bill; it was held, that B. had not absolutely lost his lien by sending the waggon to the blacksmith, and that it revived on his again obtaining possession; and that allowing A. to move the box to the highway was no waiver of his lien: *Milburn v. Milburn*, 4 U. C. Q.

Parting with
possession
puts an end to
lien.

B. 179; and see *Webber v. Cogswell*, 2 S. C. R. 15; but, see *McNeil v. Keleher*, 15 C. P. 470; *Reilly v. McIlmurray*, 29 O. R. 167. Section 51.

And where an engineer had furnished an engine and boiler for a barge, and part of the contract price was not payable until after a trial trip; and after the barge was ready to make the trip, but before it had been made, the owner failed, and a receiver having been appointed took possession of the barge, which was at that time lying in the docks in the name of the engineer, it was, nevertheless, held, that the right of lien was not lost: *Ex p. Willoughby*, 16 Ch. D. 604; 44 L. T. 111.

And where a person contracts to build or construct chattels on the property of the purchaser, e.g., oil tanks, he is entitled to a lien on such chattels so long as they have not been formally delivered up to, and accepted by, the purchaser: *Bellamy v. Davey*, (1891) 3 Ch. 540; *Roberts v. Bank of Toronto*, 21 A. R. 629

A lien cannot be claimed so as to intercept the performance of the actual contract between the parties, whether the contract is expressed, or is to be inferred from a certain course of dealing: *per* Lord Selborne, L. C., *Fisher v. Smith*, 4 H. L. 1; 39 L. T. 430. Lien cannot be claimed so as to intercept performance of contract.

When the work is done on credit, and the period of credit has not expired before the goods are to be delivered, no lien exists: *Cross*, 43. But it is said if the bailee retain possession, and the owner become bankrupt before the period of the credit has expired, the lien would attach as against the assignee; *Phillips*, s. 499. But such lien, if any, could not prevail against a Lien, how affected by credit being given.

Section 51. person to whom the chattel may in the meantime have been sold by the owner : *Crawshaw v. Homfray*, 4 B. & Ald. 50.

Taking security, effect of on lien. The taking of a security payable at a future day, in the absence of an agreement to the contrary, puts an end to the lien : *Dempsey v. Carson*, 11 C.P. 462; but the mere taking of security for the debt does not put an end to the lien, unless there be something in the facts of the case, or in the nature of the security taken, which would be inconsistent with the retention of the lien : *Angus v. McLachlan*, 23 Ch.D. 330; 48 L. T. 863.

Possession must be lawful. The possession must be lawful, or there will be no lien. Where one wrongfully obtains possession of chattels, and delivers them to a third party, who bestows moneys, skill or materials thereon, the latter would have no lien therefor, as against the rightful owner : *Hartop v. Hoare*, 3 Atk. 43.

Lien only arises under a contract. The lien can only arise by virtue of a contract, express or implied, with the owner or his agent : *Phillips*, ss. 494, 497. A sub-contractor has no right of lien which could be enforced against the owner under this section : *Phillips*, s. 496.

(c) "three months," *i. e.* calendar months : see *The Interpretation Act*, (R. S. O. c. 1), s. 8, s.s. 15.

(d) "after the same ought to have been paid." Where credit is given, and the right of lien is preserved by express agreement, the three months will not commence to run until the expiration of the period of credit.

Sale of chattel to realize lien. (e) "to sell the chattel." Prior to this Act a person acquiring a lien on a chattel for work done, had only a

right to retain it in his possession until his claim was paid by the owner; the present Act enables him to realize the amount due by a sale of the chattel. Section 51.

It would seem that the lien-holder cannot himself be the purchaser at the sale: see *King v. England*, 4 B. & S. 782; *Williams v. Grey*, 23 C. P. 561; *Burnham v. Waddell*, 28 C. P. 263; 3 A. R. 288. Lien holder cannot be purchaser.

(f) "**on giving one week's notice.**" A week should elapse from the date of the first publication of the notice, before the sale. The notice should strictly follow the Act, any material omission might invalidate the sale, and subject the vendor to an action of damages: see *Shultz v. Reddick*, 43 U. C. R. 155. Notice of sale.

For Form of Notice of Sale, see Appendix.

(g) "**amount due to him.**" A workman detaining a chattel in respect of a lien for work done thereon, has no claim for warehouse charges during such detention: *Bruce v. Everson*, 1 Cab & Ellis, 18. Lien-holder cannot claim warehouse charges.

(h) "**shall, upon application, pay over any surplus.**" The Act does not cast upon the lien-holder the duty of finding out the owner and tendering him the surplus, but merely requires him to pay it over on the application of the owner. Surplus, how to be disposed of.

The lien-holder would not be justified in mixing the surplus with his own moneys, or using it for his own purposes. He should either pay it over to the party entitled, or, if there be any difficulty in doing that, he may, under the *Trustee Relief Act*, pay the money into the High Court of Justice: see *Taylor & Ewart*, pp.

Section 51. 136-143, where it will bear interest at the rate allowed by the Court ; or, he must otherwise set it apart that it may be fruitful for the party entitled. If he neglect to do either of these things, he may be chargeable with interest on the surplus while it remains in his hands : see *Charles v. Jones*, 35 Ch. D. 544 ; 56 L. T. 848.

Section 52. **52.** The provisions of this Act so far as they affect railways under the control of the Dominion of Canada are only intended to apply so far as the Legislature of this Province has authority or jurisdiction in regard thereto. 59 V. c. 35, s. 6 (4).

How far Act
applies to
railways.

See *supra*, pp. 30-34, 45-47.

SCHEDULE.

FORM 1.

*(Section 17.)**Claim of Lien for Registration.*

A. B (name of claimant) of (here state residence of claimant,) (if so, as assignee of, stating name and residence of assignor) under The Mechanics' and Wage-Earners' Lien Act claims a lien upon the estate of (here state the name and residence of owner of the land upon which the lien is claimed) (a), in the undermentioned land in respect of the following work [service or materials] that is to say (here give a short description of the nature of the work done or materials furnished and for which the lien is claimed,) which work [or service] was [or is to be] done [or materials were furnished] for (here state the name and residence of the person upon whose credit the work is done or materials furnished,) (b) on or before the
 day of

(a) For the purpose of avoiding the difficulty which arose in Makins v. Robinson, 6 O. R. 1, it might be well to insert here, "and all persons claiming under him subsequently to the (date when lien attached)" : see ante, p. 104.

(b) The omission of the particulars referred to in this parenthesis by a sub-contractor was held to be fatal to the validity of the claim ; and it was held that the omission might be relied on by the contractor through whom the sub-contractor claimed, so as to relieve him (the contractor) from liability to costs ; though not raised by

the lien is claimed), (a) in the undermentioned land in respect of _____ days' work performed thereon while in the employment of (here state the name and residence of the person upon whose credit the work was done) on or before the _____ day of _____

The amount claimed as due is the sum of \$

The following is the description of land to be charged, (*here set out a concise description of the land to be charged sufficient for the purpose of registration.*)

Dated at _____ this _____ day of _____
(Signature of claimant.)

FORM 3.

(Section 18.)

Claim of Lien for Wages by Several Claimants.

The following persons under *The Mechanics' and Wage-Earners' Lien Act* claim a lien upon the estate of *(here state the name and residence of the owner of land upon which the lien is claimed)* (a) in the undermentioned land in respect of wages for labor performed thereon while in the employment of *(here state name and residence, or names and residences, of employers of the several persons claiming the lien)*.

A. B. of (residence) \$ for days' wages.

C. D. “ \$ for days’ wages.

E. F. “ \$ for days’ wages.

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

Dated at _____ this _____ of _____
(Signature of the several claimants.)

(a) See note (a) to Form 1.

FORM 4.

(Section 17.)

Affidavit Verifying Claim for Registration.

I, *A. B.*, named in the above (*or* annexed) claim, do make oath that the said claim is true.

Or, We, *A. B.* and *C. D.*, named in the above (*or* annexed) claim, do make oath, and each for himself says that the said claim, so far as relates to him, is true.

[*Where affidavit made by agent or assignee a clause must be added to the following effect :—*I have full knowledge of the facts set forth in the above (*or* annexed) claim.]

Sworn before me (*a*) at _____, in the
county of _____, this
day of _____, A. D., 18 _____ }

Or, The said *A. B.* and *C. D.* were sever-
ally sworn before me at _____, in the county
of _____, this _____ day of _____, }
A.D., 18 _____ .

Or, The said *A. B.* was sworn before me
at _____, in the county of _____, }
this _____ day of _____, A.D., 18 _____ . }

(*a*) As to the persons before whom the affidavit may be sworn :
see *ante*, section 17, note (*i*), p. 101.

FORM 5.

(Section 31.)

Affidavit Verifying Claim in Commencing an Action.

(Style of Court and Cause.) (a)

I, _____, make oath and say, that I have read, or heard read, the foregoing statement of claim (b) and I say that the facts therein set forth are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect of my lien is the just and true amount due and owing to me after giving credit for all the sums of money or goods or merchandise to which (*naming the debtor*) is entitled to credit as against me.

59 V. c. 35, Sched. Forms 1-5.

FORM 6.

(Sections 23 and 24.)

Certificate for Registration.

*(Style of Court and Cause.)**(Date .)*

I certify that the above named plaintiff has commenced an action in the above Court to enforce against the following land (*describing it*) a claim of Mechanics' Lien for \$ _____.

60 V. c. 15, Sched. A (76).

(a) All actions to enforce mechanics' liens are to be brought in the High Court, no matter what the amount of the plaintiff's claim may be : see section 31 (1), *ante*, p. 140.

(b) No form of a statement of claim is given in the Act, a form, however, will be found, *post*, in the Appendix.

FORM 7.

*(Section 31.)**Defence.*

(Style of Court and Cause.)

A. B., disputes that the plaintiff is now entitled to a mechanic's lien on the following grounds: *(Setting forth the grounds shortly.)*

(a) The lien has not been prosecuted in due time as required by statute.

(b) That there is nothing due to the plaintiff.

(c) That the plaintiff's lien has been vacated and discharged.

(d) That there is nothing due by _____ *(the owner)* for the satisfaction of the plaintiff's claim.

Delivered on the _____ day of _____ by *A. B.* in person, whose address for service is *(stating address within two miles of the court house)*, or

Delivered on the _____ day of _____ by *V. Z.*, solicitors for the said *A. B.*

NOTE—*If the owner does not dispute the lien entirely and only wishes to have the accounts taken he may use Form 8.*

FORM 8.

(Section 31.)

Defence where there are no matters disputed, or where the matters in dispute are matters of account.

(Style of Court and Cause.)

A. B. admits that the plaintiff is entitled to a lien and claims that the following is a just and true statement of the account in question:—

Amount of contract price for work contracted to be performed by *E. F.* as plumber on the lands in question herein \$500 00

Amounts paid on Account.

June 1st, 1889, paid <i>E. F.</i>	\$200 00
July 1st, 1889, paid <i>G. H.</i> and <i>I. K.</i> , sub-contractors of <i>E. F.</i>	100 00
	<hr/> \$300 00

Balance admitted to be due \$200 00

For satisfaction of lien of plaintiff and other lien-holders (*as the case may be*) *A. B.*, before action tendered to the plaintiff \$ in payment of his claim and now brings into Court \$ and submits that that amount is sufficient to pay the plaintiff's claim, and asks that this action be dismissed as against him with costs.

Delivered, etc.

FORM 9.

*(Section 49.)**Affidavit of Owner Verifying Account.*

(Style of Court and Cause.)

I, *A. B.*, of _____, being the owner of the lands in question in this action, make oath and say: That the account set forth in the foregoing defence is a just and true account of the amount of the contract price agreed to be paid by me to *E. F.* for the work contracted to be done by him on the lands in question.

The said account also justly and truly sets forth the payments made by me on account thereof, and the person or persons to whom the same were made; and the balance of [\$200] appearing by such account to be still due and payable is the just and true sum now due and owing by me in respect of my contract with the said *E. F.*

Sworn, etc.

FORM 10.

*(Section 36.)**Notice of Trial.*

(Style of Court and Cause.)

Take notice that this action will be tried at the Court House, in the Town of _____, in the County of _____, on the day of _____ by _____ and at such time and place the _____ will proceed to try the action and all questions which arise in or which are necessary to be tried to completely dispose of the action and to adjust the rights and liability of the persons appearing before him, or upon whom this notice of trial has been served, and at such trial he will take all accounts, make all inquiries and give all directions and do all things necessary to try and otherwise finally dispose of this action, and of all matters, questions, and accounts arising in said action, and will give all necessary relief to all parties.

And further take notice that if you do not appear at the trial and prove your claim, if any, or prove your defence, if any, to the action, the proceedings will be taken in your absence and you may be deprived of all benefit of the proceedings and your rights disposed of in your absence.

This is a Mechanic's Lien action brought by the above named plaintiff against the above named defendants to enforce a Mechanic's Lien against the following lands :—*(set out description of lands.)*

This notice is served by, etc.

FORM II.

(Section 49.)

Statement of Account by Lien-holders, not parties to the action.

*(Style of Court and Cause.)**E. F.**Dr. to G. H.*

1889.

Jan. 1, To 12 doz. brackets	\$12 00
Feb. 3, " 50 lbs. of nails	5 00
Oct. 3, " 60 sheets of glass	40 00
	<hr/>
	\$57 00

Cr.

1889.

Feb. 4, By cash	\$ 4 00
June 5, " goods	20 00
	<hr/>
	\$24 00
	<hr/>
	\$33 00

FORM 12.

*(Section 49.)**Affidavit of Lien-holder Verifying Claim.*

(Style of Court and Cause.)

I, *G. H.*, of (*address and occupation*), make oath and say :—I have in the foregoing account (*or* in the account now shown to me marked A) set forth a just and true account of the amount due and owing to me by *E. H.* (*the owner*) [*or* by *E. F.*, who is a contractor with the defendant, *L. G.* (*the owner*),] of the lands in question, and I have in the said account given credit for all sums in cash or merchandise or otherwise to which the said *E. F.* is justly entitled to credit in respect of the said account and the sum of \$33 appearing by such account to be due to me as the amount (*or balance*) of such account is now justly due and owing to me.

Sworn, etc

59 V. c. 35, Sched., Forms 6-11.

FORM 13.

(Section 35.)

Judgment.

In the High Court of Justice.

Monday the 10th July, 1896.

Name of Judge or officer.

*William Spencer, Plaintiff,
and*

Thomas Burns, Defendant.

This action coming on for trial before
in at
upon opening of the matter and it appearing that the following
persons have been duly served with notice of trial herein, (*set out
names of all persons served with notice of trial*) and all such persons
(*or as the case may be*) appearing at the trial [*if so* and the following
persons not having appeared *set out names of non-appearing persons*]
and upon hearing the evidence adduced and what was alleged by
counsel for the plaintiff and for *C. D.* and *E. F.* and the defendant
[*if so* and by *A. B.* appearing in person.

1. This Court doth declare that the plaintiff and the several
persons mentioned in the first schedule hereto are respectively
entitled to a lien under *The Mechanics' and Wage Earners' Lien
Act*, upon the lands described in the second schedule hereto, for
the amounts set opposite their respective names in the 2nd, 3rd and
4th columns of the said 1st schedule, and the persons primarily

liable for the said claims respectively are set forth in the 5th column of the said schedule.

2. [And this Court doth further declare that the several persons mentioned in schedule 3 hereto are also entitled to some lien, charge or incumbrance upon the said lands for the amounts set opposite their respective names in the 4th column of the said schedule 3, *according to the fact.*]

3. And this Court doth further order and adjudge that upon the defendant (*A. B. the owner*) paying into court to the credit of this action the sum of *(gross amount of liens in schedules 1 and 3 for which owner is liable)* on or before the *day* of *next*, that the said liens in the said 1st schedule mentioned be and the same are hereby discharged, [and the several persons in the said 3rd schedule are to release and discharge their said claims and assign and convey the said premises to the defendant (*owner*) and deliver up all documents on oath to the said defendant (*owner*) or to whom he may appoint] and the said moneys so paid into court are to be paid out in payment of the claims of the said lien-holders (*if so, and incumbrancers*).

4. But in case the said defendant (*owner*) shall make default in payment of the said moneys into court as aforesaid, this Court doth order and adjudge that the said lands be sold with the approbation of the Master of this Court at *(a)* and that the purchase money be paid into court to the credit of this action, and that all proper parties do join in the conveyances as the said Master shall direct.

5. And this Court doth order and adjudge that the said purchase money be applied in or towards payment of the several claims in

(a) When the action is tried by a Local Judge, or any of the officers mentioned in *Section 33*, the reference here directed should be to the Local Judge or officer pronouncing the judgment: see *Section 35 (1)*.

the said 1st [and 3rd] schedule[s] mentioned as the said Master shall direct, with subsequent interest and subsequent costs to be computed and taxed by the said Master.

6. And this Court doth further order and adjudge that in case the said purchase money shall be insufficient to pay in full the claims of the several persons mentioned in the said 1st schedule, the persons primarily liable for such claims as shewn in the said 1st schedule do pay to the persons to whom they are respectively primarily liable the amount remaining due to such persons forthwith after the same shall have been ascertained by the said Master.

7. [And this Court doth declare that _____ have not proved any lien under *The Mechanics' and Wage Earners' Lien Act*, and that they are not entitled to any such lien, and this Court doth order and adjudge that the claims of liens respectively registered by them against the lands mentioned in the said 2nd schedule be and the same are hereby discharged, *according to the fact.*]

SCHEDULE 1.

Names of lien-holders entitled to mechanics' liens.	Amount of debt and interest (if any).	Costs.	Total.	Names of primary debtors.

(Signature of officer issuing judgment.)

SCHEDULE 2.

The lands in question in this matter are

(Set out by a description sufficient for registration purposes.)

(Signature of officer issuing judgment.)

SCHEDULE 3.

Names of persons entitled to incumbrances other than mechanics' liens.	Amount of debt and interest (if any).	Costs.	Total.

(Signature of officer issuing judgment.)

FORM 14.

*(Section 27.)**Certificate Vacating Lien.*

*(Style of Court and Cause.)**Date.*

I certify that the defendant *A. B. (the owner)* has paid into court to the credit of this cause all money due and payable by him for the satisfaction of the liens of the plaintiff and *E. F., G. H., I. J., and K. L.*, and their liens are hereby vacated and discharged so far as the same affect the following lands *(describe lands)*.

(Signature of Master or Referee.)

FORM 15.

*(Section 27.)**Certificate Vacating Lien.*

*(Style of Court and Cause.)**Date.*

I certify that I have inquired and find that the plaintiff is not entitled to a mechanic's lien upon the lands of the defendant *A. B. (the owner)* and his claim of lien is hereby vacated and discharged so far as the same affects the following lands *(describe lands)*.

(Signature of Master or Referee.)

The Mechanics and Wage-Earners' Lien Act of MANITOBA.

(61 VICTORIA, CAP. 29.)

[Assented to 27th April, 1898.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Manitoba, enacts as follows :—

1. This Act may be cited as "*The* ^{Section 1.}
Mechanics and Wage-Earners' Lien Act, ^{Short title.}
1898"

2. Where the following words occur in ^{Section 2.}
this Act, or in the schedules hereto, they ^{Interpretation}
shall be construed in the manner hereinafter
mentioned unless a contrary intention ap-
pears :—

(1) "Contractor" shall mean a person ^{"Contractor."}
contracting with or employed directly by the
owner or his agent for the doing of work or

Section 2.
—

placing or furnishing materials for any of the purposes mentioned in this Act.

"Sub contractor."

(2) "Sub-contractor" shall mean a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid, but contracting with or employed by a contractor, or under him by another sub-contractor.

"Owner."

(3) "Owner" shall extend to and include any person, firm, association, body corporate or politic, including a municipal corporation (a) having any estate or interest in the lands upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

"Person."

(4) "Person" shall extend to and include

a body corporate or politic, a firm, partner-
ship or association. Section 2.

(5) "Material" shall include every kind of "Material,"
moveable property.

(6) "Registry office" shall include land "Registry
office."
titles office.

(7) "Registrar" shall include "District "Registrar."
Registrar."

See Ont. Act, s. 2, *supra*, p. 4.

The Ont. Act includes a "railway company" under the definition of "owner," but that is omitted from this Act. In other respects this *section* agrees with the Ont. Act.

A foreign unlicensed corporation would seem to be entitled to acquire a lien under this Act, notwithstanding R. S. M., c. 24, s. 13: see *Bank of Montreal v. Condon*, 11 Man., 366.

The corresponding *section* of the Ont. Act includes a definition of "wages" which is found in this Act, s. 12 (6) *infra*, p. 218.

(a) The Ont. Act has here the words "and railway company."

3. No agreement shall be held to deprive Section 3.
anyone otherwise entitled to a lien under this Contracts not
to deprive
third party of
lien.
Act, and not a party to the agreement, of the
benefit of the lien, but the lien shall attach,
notwithstanding such agreement.

See Ont. Act, s. 6, *supra*, p. 39.

The agreement to waive a lien must be in writing: see

Section 3. *infra*, s. 4. A contractor cannot bind any sub-contractor by any such agreement: *Anly v. Holy Trinity Church*, 2 Man. 248.

This Act gives, as does the Ont. Act, a lien for both work and materials. But a lien for materials only arises where the goods are supplied for the purpose of being used in the particular building on which the lien is claimed: *Sprague v. Besant*, 3 Man. 519.

Section 4. **4. (1)** Unless he signs an express agree-
 Nature of lien. ment to the contrary, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, (a) land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, (b) sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, (c) or the appurtenances to any of them, for any owner, contractor or sub contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building (a), land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation (b), sidewalk, paving, fountain, fish-

pond, drain, sewer, aqueduct, roadbed, way, (a) Section 4.
 and appurtenances thereto, and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the said work or service is performed, or upon which such materials are placed, or furnished to be used, limited however in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (excepting as herein provided) by the owner. No lien for sum under §20. Provided that no such lien shall exist under this Act for any claim under the sum of twenty dollars.

(2) Such lien, upon registration as herein- Commence-
ment of lien
 after provided, shall arise and take effect from the date of the commencement of such work or service or from the placing of such materials as against purchasers, chargees or mortgagees under instruments, registered or unregistered (d).

See Ont. Act s. 4, *supra*, p. 18.

The Court has no jurisdiction to enforce a lien on land out of its territorial jurisdiction: *Chadwick v. Hunter*, 1 Man. 363.

The limitation of liens to claims for \$20 and upwards is peculiar to this Act.

Under the former Mechanics' Lien Act for Manitoba, it was held that where a contractor had not completed

Section 4.

his contract, he could not enforce a lien for any more than what, if anything, was actually due according to the contract: *Brydon v. Lutes*, 9 Man. 463; and see *McArthur v. Dewar*, 3 Man. 72; this is probably still the law as regards contractors and sub-contractors except wage-earners; but as to wage-earners entitled to a lien see *infra*, section 12 (4), *post* p. 217.

A sub-contractor is entitled to a lien even though the contractor under whom he claims has agreed with the owner that no workman shall be entitled to a lien: *Auly v. Holy Trinity Church*, 2 Man. 248.

Municipal buildings have in Manitoba been held to be subject to mechanics' liens: *McArthur v. Dewar*, 3 Man. 72, and see *McLennan v. Winnipeg*, 3 Man. 474; so also a public school: *Moore v. Bradley*, 5 Man. 49. As to their liability to such liens in Ontario, see *supra*, p. 29, note (g).

The claim of a lien-holder under this Act, is a preferential claim under *The Dominion Winding-Up Act*, (R. S. C. c. 129): *Re Empire B & M Co.*, 8 Man. 424.

(a) The Ont. Act has here the word "railway."

(b) The Ont. Act has here the word "fence."

(c) The Ont. Act has here the words "fruit and ornamental trees."

Sub-section 2 of this *section* explicitly states what is probably implicitly contained in the Ont. Act. Under the former Act it was held that a lien had no existence until it was registered: *Kievell v. Murray*, 2 Man. 209.

(d) *Sub-section 2* and the proviso at the end of *sub-section 1*, are not in the Ont. Act.

5 —(1) The lien shall attach upon the estate or interest of the owner as defined by this Act in the erection, building (*a*), land, wharf, pier, bulkhead, bridge, trestle-work, vault, mine, well, excavation (*b*), sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way (*c*), and the appurtenances thereto, upon or in respect of which the work or service is performed, or the materials placed or furnished to be used, and the lands occupied thereby or enjoyed therewith.

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Property upon which lien shall attach.

(2) In cases where the estate or interest charged by the lien is leasehold the fee simple may also, with the consent of the owner thereof, be subject to said lien, provided such consent is testified by the signature of such owner upon the claim of lien at the time of the registering thereof, and duly verified.

Where estate charged is leasehold.

(3) In case the land upon or in respect of which the work is done or materials or machinery are placed, be incumbered by a mortgage or other charge existing or created before the commencement of the work or of the placing of the materials or machinery upon the land, such mortgage or other charge

Mortgaged land.

Section 5.

shall have priority over a lien under this Act to the extent of the actual value of such land at the time the improvements were commenced.

See Ont. Act, s. 7 (1), *supra*, p. 41, to the same effect as this section, with the exception of *sub section* 3, which is somewhat different.

(a) The Ont. Act has here the word "railway."

(b) The Ont. Act has here the word "fence."

(c) The Ont. Act has here the words "fruit and ornamental trees"

Where at the time the work was commenced the "owner's" interest in the land is simply that of a purchaser whose purchase money is unpaid, the lien-holder can only acquire a lien on that interest, and it is subject to the lien of the unpaid vendor for his purchase money: *Flack v. Jeffrey*, 10 Man. 514; but the purchaser cannot defeat the lien on the purchaser's interest by taking a release thereof: *Ib.*

Section 6.

Application
of insurance
when lien
attaches.

6. Where any of the property upon which a lien is given by this Act is wholly or partly destroyed by fire, any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee shall take the place of the property so destroyed, and shall, after satisfying any prior mortgage or charge in the manner and to the extent set out in sub section (3) of section 5 of this Act, be

subject to the claims of all persons for liens to the same extent as if such moneys were realized by a sale of such property in an action to enforce a lien. Section 7.

See Ont. Act, s. 8, *supra*, p. 56, which is to the same effect. The present *section* being a little more specific as to the right of the mortgagee to prior payment out of insurance money.

7. Save as herein provided, the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor. Section 7.
Limit of
amount of
lien.

See Ont. Act, s. 9, *supra*, p. 58, to the same effect.

Although a sub-contractor's lien depends upon there being something due by the "owner" to the contractor under whom the sub-contractor claims, still it was formerly not necessary to give evidence on this point at the hearing of the action as that was a matter of account for the Master's office: *McLennan v. Winnipeg*, 3 Man. 474; but probably, under the new procedure, this case would not now be followed. A sub-contractor has no lien on money which would be payable on the contract if the work were properly performed, but which the contractor has failed to earn: *McArthur v. Dewar*, 3 Man. 72; and see *Brydon v. Lutes*, 9 Man. 463; unless he be a wage-earner to whom *section* 12 (4), *infra*, applies.

But the contractor cannot, by release or assignment of

Section 7. — his rights under his contract with the owner, defeat the registered lien of a sub-contractor claiming under him. Under the former Act a release or assignment by the contractor of his lien made before the registration of his sub-contractor's lien, would take priority over it : *Anly v. Holy Trinity Church*, 3 Man. 193 ; but under the present Act the registration of a lien would seem to have a retrospective operation : see *section 4 (2), supra*, p. 207.

Section 8.
Limit of lien
when claimed
by some
other
contractor.

8. Save as herein provided, where the lien is claimed by any other person than the contractor, the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or sub-contractor or other person for whom the work or service has been done or the materials have been placed or furnished.

See Ont. Act, s. 10, *supra*, p. 59, to the same effect. See note to the preceding *section*.

Section 9.
Percentage to
be deducted
and retained
by owner.

9. (1) In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise under the provisions of this Act shall, as the work is done or materials are furnished under any contract, deduct from any payments to be made by him in respect of such contract, and retain for a

period of thirty days after the completion or abandonment of the contract twenty per cent. of the value of the work, service and materials actually done, placed or furnished, as defined by Section 4 of this Act, and such value shall be calculated on the basis of the price to be paid for the whole contract ; Provided that when any contract exceeds \$15,000, the amount to be retained shall be fifteen per cent. instead of twenty per cent. ; and the liens created by this Act shall be a charge upon the amounts directed to be retained by this section in favour of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable. Section 9.

(2) All payments up to eighty per cent. (or eighty-five per cent. where the contract price exceeds \$15,000) of such value made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor before notice in writing of such lien given by the person claiming the lien to the owner, contractor or the sub-contractor, as the case may be, shall operate as a discharge *pro tanto* of the lien created by this Act.

Section 9.

(3) Payment of the percentage required to be retained under Sub-section 1 of this Section may be validly made so as to discharge all liens or charges under this Act in respect thereof after the expiration of the said period of thirty days mentioned in said Sub-section 1, unless in the meantime proceedings have commenced under this Act to enforce any lien or charge against such percentage as provided by Sections 21 and 22 of this Act.

See Ont. Act, s. 11, *supra*, p. 60, to the same effect.

Section 10.

Payment
made in good
faith without
notice of lien.

10. In case an owner or contractor chooses to make payments to any persons referred to in Section 4 of this Act for or on account of any debts justly due to them for work or service done or for materials placed or furnished to be used as therein mentioned, and shall within three days afterwards give, by letter or otherwise, written notice of such payment to the contractor or his agent, or to the sub-contractor or his agent, as the case may be, such payments shall, as between the owner and the contractor or as between the contractor and the sub-contractor, as the case may be, be deemed to be payments to the contractor or sub-contractor, as the case may

be, on his contract generally, but not so as to affect the percentage to be retained by the owner, as provided by Section 9 of this Act. Section 11.

See Ont. Act, s. 12, *supra*, p. 70, to the same effect.

11. (1) The lien created by this Act shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of such lien as hereinafter provided. Section 11.
Priority of
lien.

(2) In case of an agreement for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance made to the purchaser, the purchaser shall, for the purposes of this Act and within the meaning thereof, be deemed a mortgagor and the seller a mortgagee. Agreements
for purchase,
part of
purchase money
unpaid.

(3) Excepting where it is otherwise declared by this Act, no person entitled to a lien on any property or to a charge on any moneys under this Act shall be entitled to Priority
among lien-
holders.

Section 11.

any priority or preference over another person of the same class entitled to a lien or charge on such property or moneys under this Act, and each class of lienholders, except where it is otherwise declared by this Act, shall rank *pari passu* for their several amounts, and the proceeds of any sale shall, subject, as aforesaid, be distributed among the lienholders *pro rata*, according to their several classes and rights.

See Ont. Act, s. 13, *supra*, p. 72, to the same effect.

Section 12.

Priority of
lien for wages.

12. (1) Every mechanic or laborer whose lien is for work done for wages shall, to the extent of thirty days' wages, have priority over all other liens derived through the same contractor or sub-contractor to the extent of and on the twenty per cent. or fifteen per cent., as the case may be, of the contract price directed to be retained by Section 9 of this Act, to which the contractor or sub-contractor through whom such lien is derived is entitled, and all such mechanics and labourers shall rank *pari passu* on said twenty per cent. or fifteen per cent., as the case may be.

(2) Every wage-earner shall be entitled to enforce a lien in respect of the contract not completely fulfilled. Section 12.
Enforcing lien
in such cases.

(3) In case of the contract not having been completely fulfilled when the lien is claimed by wage-earners, the percentage aforesaid shall be calculated on the work done or materials furnished by the contractor or sub-contractor by whom such wage-earners are employed. Calculating
percentage
when contract
not fulfilled.

(4) Where the contractor or sub-contractor makes default in completing his contract the percentage aforesaid shall not, as against a wage-earner claiming a lien under this Act, be applied to the completion of the contract or for any other purpose by the owner or contractor, nor to the payment of damages for the non-completion of the contract by the contractor or sub-contractor, nor in payment or satisfaction of any claim of any kind against the contractor or sub-contractor. Percentage
not to be
otherwise
applied.

(5) Every device by an owner, contractor or sub-contractor adopted to defeat the priority given to wage-earners for their wages by this Act shall, as respects such wage-earners, be null and void. Devices to
defeat priority
of wage-
earners.

Section 12.
 "Wages,"
 meaning of.

(6) "Wages" shall mean money earned by a mechanic or laborer for work done, whether by the day or as piece work.

See Ont. Act, s. 14, *supra*, p. 77, to the same effect, except *sub section* (6), as to which, see Ont. Act, s. 2 (6), *supra*, p. 5.

Section 13.
 Attempting to
 remove mate-
 rial affected
 by lien.

13. (1) During the continuance of a lien no portion of the materials affected thereby shall be removed to the prejudice of the lien, and any attempt at such removal may be restrained on application to the Court of Queen's Bench, or to a Judge, or Local Judge thereof, having power to try an action to realize a lien under this Act.

Costs.

(2) The Court, Judge, or Local Judge, to whom any such application is made, may make such order as to the costs of and incidental to the application and order as he deems just.

Goods fur-
 nished for cer-
 tain purposes
 not to be sub-
 ject to execu-
 tion.

(3) When any material is actually brought upon any land to be used in connection with such land for any of the purposes enumerated in Section 4 of this Act, the same shall be subject to a lien in favour of the person supplying the same until put in the building, erection or work.

See Ont. Act, s. 16, *supra*, p. 90, to the same effect as regards *sub-sections* (1) and (2). *Sub-section* (3) differs materially from the Ont. Act, and does not bear out the statement in the side note. It would seem to limit rather than enlarge the lien of a material man, for the word "until" seems to put an end to his right of lien, but this would be at variance with *section* 5.

Section 13.

14. A claim for lien may be registered in land titles office in which instruments or dealings affecting the lands affected or proposed to be affected thereby are to be registered, if such lands have been brought, or if application has been made to bring them, under the operation of "The Real Property Act," or if the lands have not been so brought, or application made therefor, then such statement shall be registered in the registry office or land titles office for the registration district or land titles district, in which such lands are situate. If the lands be partly under the operation of the said Act, and partly not, each portion shall be affected only by registration in the proper office.

Section 14.

Office of registration.

See Ont. Act, s. 17 (1), *supra*, p. 95, to the like effect.

15. A claim for lien shall state

Section 15.

(a) The name and residence of the person

Registration of claim for lien.

Section 15. claiming the lien and of the owner of the property to be charged (or of the person whom the person claiming the lien, or his agent, believes to be the owner of the property to be charged) and of the person for whom and upon whose credit the work (or service) is done, or materials furnished or placed, and the time or period within which the same was, or was to be, done or furnished or placed ;

(b) A short description of the work (or service) done or materials furnished or placed or to be furnished or placed ;

(c) The sum claimed as due or to become due ;

(d) The description of the land to be charged sufficient for the purpose of registration ;

(e) The date of expiry of the period of credit (if any) agreed by the lienholder for payment for his work (or service) or materials where credit has been given.

Form of claim. (2) The claim may be in one of the forms given in the schedule to this Act and shall be verified by the affidavit of the person

claiming the lien or of his agent or assignee having a personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he has such knowledge. Section 15

See Ont. Act, s. 17 (A), *supra*, p. 95, to the like effect.

The Ont. Act includes a clause (3), providing for the registration of liens against railway companies, which is not to be found in this Act, which is probably not intended to authorize the registration of liens against railway companies at all.

It would seem to be unnecessary that the claim registered should specify in detail the work and materials for which the lien is claimed: see the Form 1, in the Schedule; and see *Irwin v. Beynon*, 4 Man. 10.

As to the statement of the time when the work was done or materials supplied: see *Kelly v. McKenzie*, 1 Man. 169; *Flack v. Jeffrey*, 10 Man. 514.

16. A claim for lien may include claims against any number of properties, and any number of persons claiming liens upon the same property may unite therein, but where more than one lien is included in one claim each lien shall be verified by affidavit as provided in Section 15 of this Act. Section 16.
What may be included in claim.

See Ont. Act, s. 18, *supra*, p. 102, to the same effect.

Section 17.

Claims not to
be invalidated
for informa-
lity.

17. (1) A substantial compliance only with Sections 15 and 16 of this Act shall be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites of Sections 15 and 16 of this Act, unless in the opinion of the Court, Judge, or Local Judge, who has power to try an action under this Act, the owner, contractor or sub-contractor, mortgagee or other person, as the case may be, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

Liens must be
registered.

(2) Nothing in this section contained shall be construed as dispensing with registration of the lien required by this Act.

See Ont. Act, s. 19, *supra*, p. 103, to the same effect.

Lien to be
registered as
an incum-
brance.

18. (1) The registrar upon payment of his fee, shall register the claim, so that the same may appear as an incumbrance against the land therein described.

Fee for regis-
tration.

(2) The fee for registration of a claim of lien for wages shall be twenty-five cents.

See Ont. Act, s. 20, *supra*, p. 106, containing similar provisions.

19. Where a claim for lien is so registered, the person entitled to the said lien shall be deemed a purchaser, *pro tanto*, and within the provisions of "The Registry Act," but except as herein otherwise provided, "The Registry Act" shall not apply to any lien arising under this Act.

Section 19.

Person
registering a
purchaser
pro tanto.

See Ont. Act, s. 21, *supra*, p. 107, to the same effect.

20. (1) A claim for lien by a contractor or sub-contractor may, in cases not otherwise provided for, be registered before or during the performance of the contract or within thirty days after the completion thereof.

Section 20.

Claims for
liens when to
be registered.

(2) A claim for lien for materials may be registered before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished or placed

(3) A claim for lien for services may be registered at any time during the performance of the service or within thirty days after the completion of the service.

(4) A claim for lien for wages may be registered at any time during the performance of the work for which such wages are

Section 20.

claimed, or within thirty days after the last day's work for which the lien is claimed.

See Ont. Act, s. 22, *supra*, p. 112, to the same effect.

Under the former Act the lien had no existence until registered: *Kievell v. Murray*, 2 Man. 209; but under the present Act, it is not necessary to register the lien before action, if the certificate of *lis pendens* is registered in an action to enforce it, within the time limited by s. 21, *infra*.

Where materials are supplied from time to time as a building progresses, not under a contract covering the whole supply, but as they are from time to time required, and ordered, each sale is a separate transaction, and the subject of a separate registration: *Chadwick v. Hunter*, 1 Man. 39.

The question of the time of the completion of the work becomes material in determining whether or not a lien has been duly registered. What is meant by completion is the substantial completion of the work, and the subsequent supplying of trifling defects will not have the effect of prolonging the time for the registration of the lien under this section, or for bringing the action to enforce the lien under section 22 *infra*: *Kelly v. McKenzie*, 1 Man. 169; and see *McLennan v. Winnipeg*, 3 Man. 474; *Summers v. Beard*, 24 O. R. 641; but where the performance of a substantial part of the contract was delayed owing to the plaintiff being unable to pay for materials in consequence of the defendant's refusal to pay him what was due, it was held that the date of its subsequent completion of what remained to be done was the completion of the work, and the date from

which the time for registration of the claim must be computed : *Irwin v. Beynon*, 4 Man. 10. Section 20.
—

The misnomer of the "owner," a corporation aggregate, in the style of the action was held to be immaterial and amendable where the registered claim was in proper form : *Moore v. Bradley*, 5 Man. 49 ; but see *supra*, p. 100.

Under the former Act an assignee of a person entitled to claim a lien, might register the claim verified by his own affidavit : *Kelly v. McKenzie*, 1 Man. 169 ; and see *infra*, s. 23.

21. Every lien which is not duly registered under the provisions of this Act shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof, unless in the meantime an action is commenced to realize the claim, or in which the claim may be realized under the provisions of this Act, and a certificate of *lis pendens* thereof be registered in the registry office, or land titles office. Section 21.
—
Liens to cease if action not commenced within time fixed by Act.

See Ont. Act, s. 23, *supra*, p. 118, to the like effect.

22. Every lien which has been duly registered under the provisions of this Act shall absolutely cease to exist after the expiration of ninety days after the work or service has been completed or materials Section 22.
—
When lien to cease if registered and proceeded upon.

Section 22. have been furnished or placed, or the expiry of the period of credit, where such period is mentioned in the claim of lien registered, unless in the meantime an action is commenced to realize the claim under the provisions of this Act or an action is commenced in which the claim may be realized under the provisions of this Act, and a certificate of *lis pendens* thereof according to Form 6 in the schedule hereto be registered in the proper registry office, or land titles offices.

See Ont. Act, s. 24 (1), *supra*, p. 123, to the like effect. S. 24 of the Ont. Act also contains a provision not in this Act, providing that liens shall cease in six months unless registration renewed, or proceedings instituted.

Section 23.
Death of lienholder.

23. In the event of the death of a lienholder his right of lien shall pass to his personal representatives; and the right of a lienholder may be assigned by any instrument in writing.

See Ont. Act, s. 26, *supra*, p. 128, to the same effect.

Section 24.
Discharge of lien.

24. (1) A lien may be discharged by a receipt signed by the claimant, or his agent, duly authorized in writing, acknowledging payment, and verified by affidavit and

registered ; the fees shall be the same as for registering a claim of lien. Section 24.

(2) Upon application the Court, or Judge, or Local Judge, having power to try an action to realize a lien, may receive security or payment into Court in lieu of the amount of the claim, and may thereupon vacate the registration of the lien. Security or payment into court, and vacating lien thereon.

(3) The Court, or such Judge, or Local Judge, may vacate the said registration upon any other ground. Vacating registration on other grounds.

(4) The taking of any security for, or the acceptance of any promissory note for, or the taking of any other acknowledgment of the claim, or the giving of time for the payment of the claim, or the taking of any proceedings for the recovery of the claim or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice, or destroy any lien created by this Act, unless the lienholder agrees in writing that it shall have that effect ; Provided, however, that a person who has extended the time for payment of any claim for which he has a lien under this Act to obtain the benefit Certain acts not to prejudice right to enforce lien.

Section 24.

of this sub-section shall commence an action to enforce such lien within the time limited by this Act, and register a certificate as required by this Act, but no further proceedings shall be taken in the action until the expiration of such extension of time; Provided further, that notwithstanding such extension of time, such person may, where an action is commenced by any other person to enforce a lien against the same property, prove and obtain payment of his claim in such action, as if no such extension had been given.

See Ont. Act, s. 27, *supra*, p. 129. *Sub-section (1)* in the Ont. Act is somewhat more full in its provisions. *Sub-sections (2) (3)* are to the same effect. As to *sub-section (4)* of this *section*, see Ont. Act, s. 28, which is to the like effect.

Section 25.

Lien-holders
to be entitled
to information
from owner as
to terms of
contract.

25. Any lienholder or person entitled to a lien may at any time demand of the owner, or his agent, the terms of the contract or agreement with the contractor for and in respect of which the work, services or materials is or are performed or furnished or placed, and if such owner or his said agent shall not at the time of such demand or within a reasonable time thereafter,

inform the person making such demand, of Section 25.
 the terms of such contract or agreement,
 and the amount due and unpaid upon such
 contract or agreement, or shall intentionally
 or knowingly falsely state the terms of said
 contract or agreement, or the amount due or
 unpaid thereon, and if the person claiming
 the lien shall sustain loss by reason of such
 refusal or neglect or false statement, the said
 owner shall be liable to him in an action
 therefor to the amount of such loss.

See Ont. Act, s. 29, *supra*, p. 137, to the same effect.

26. The Court, or Judge, Local Judge Section 26.
 having power to try an action to realize Order for
 a lien, may, on a summary application at inspection of
 any time before or after any action is com- contract by
 menced for the enforcement of such lien, lien-holder.
 make an order for the owner or his agent to
 produce and allow any lienholder to inspect
 any such contract, and may make such an
 order as to the costs of such application and
 order as may be just.

See Ont. Act, s. 30, *supra*, p. 139, to the like effect.

27. (1) The liens created by this Act Section 27.
 may be realized by actions in the Court of Mode of realiz-
ing liens.

Section 27.

Queen's Bench, according to the ordinary procedure of that Court, excepting where the same is varied by this Act.

(2) It shall not be necessary to make any lienholders parties defendant to the action, but all lienholders served with the notice of trial shall for all purposes be treated as if they were parties to the action.

See Ont. Act. s. 31 (1), (4), *supra*, p. 140, to the same effect. Section 31 of the Ont. Act also contains provisions for commencing the proceedings by filing a statement of claim without any writ of summons.

The action may be brought not only to enforce the lien against the land, but also for a personal order for payment by the debtor primarily liable to the lien-holder: see *infra*, s. 43, and see *Davidson v. Campbell*, 5 Man. 250.

Where under the contract with the person claiming the lien the payment of the price is postponed to a date later than that on which the action to enforce the lien must be commenced under this *section*, that was formerly tantamount to an agreement that no lien should exist; but if by the contract a promissory note or other security for the price was to be given within the time allowed for commencing an action, the implied agreement to waive the lien was conditional on the note or other security being given: *Ritchie v. Grundy*, 7 Man. 532; under the present Act express provision is made as to the effect of taking security, and also for commencing

an action before the period of credit expires, where it extends beyond the time limited for bringing an action to enforce the lien : see *supra*, p. 227, section 24 (4). Section 27.

Formerly where any material amendment of a bill was made, the amended bill had to be registered as a *lis pendens* within the time prescribed for registration, or the lien would cease. Thus where the original bill alleged a contract between the plaintiffs and the owner, and, by amendment, the plaintiffs alleged their contract was with B, who had contracted with the owner, it was held that the plaintiffs could not rely on the registration of the original bill as a *lis pendens*, and the amendment having been made after the time allowed for registering a certificate of *lis pendens*, the lien had ceased : *Davidson v. Campbell*, 5 Man. 250 ; but an amendment of the bill which did not substantially vary the plaintiff's claim, did not necessitate re-registration of a certificate of *lis pendens* : *Irwin v. Beynon*, 4 Man. 10 ; a misnomer of the defendants, a corporation aggregate, was held to be of this character : *Moore v. Bradley*, 5 Man. 49.

28. Any number of lienholders, claiming liens on the same property, may join in an action, and any action brought by a lienholder shall be taken to be brought on behalf of all other lienholders on the property in question. Section 28.
Lien holders joining in action.

See Ont. Act. s. 32, *supra*, p. 145, to the same effect.

29. An action to enforce a lien may be tried by a Judge of the Court of Queen's Section 29.
Who may try action for lien.

Section 29. Bench at any regular sittings thereof for the trial of actions, or when the aggregate amount of the liens involved does not exceed the sum of \$1,000 by a Local Judge of the said Court within whose judicial district the cause of action has arisen.

See Ont. Act, ss. 33, 34, *supra*, p. 148.

Section 30.

Powers of
Local Judge
trying action
for lien.

30. A Local Judge of said Court trying such action shall have the powers of a Local Master under "The Queen's Bench Act, 1895," and all the powers and authority conferred by this Act and otherwise upon a Judge of the Court of Queen's Bench to try, determine and finally dispose of such action.

Should it appear at any time during the progress of such action to such Local Judge that the aggregate amount involved exceeds \$1,000 he shall not be thereby divested of his jurisdiction, but may with the consent of the parties proceed to try, determine and dispose of the same as aforesaid, or, in his discretion, and in any event, may refer the action to a Judge of the Court of Queen's Bench at Winnipeg to be there tried and determined,

and make all orders for the transmission of papers to the proper officers of the Court at Winnipeg and otherwise necessary for the proper trial and determination of the action. Section 30

This *section* is peculiar to this Act, and has no counterpart in the Ont. Act.

31.—(1) After the delivery of the statement of defence where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases where it is desired to try the action other than at the ordinary sittings of the Court of Queen's Bench, either party may apply to a Judge or Local Judge who has the power to try the action, to fix a day for the trial thereof, and the said Judge or Local Judge shall give an appointment fixing the day and place of trial, and on the day fixed, or on such other day to which the trial may be adjourned, shall proceed to try the action, and all questions which arise therein, or which are necessary to be tried, to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him or upon whom the notice of trial has been served, and at the trial shall take all accounts, make all in- Section 31.
Appointing
day for trial.

Section 31.

quiries and give all directions, and do all things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action or at the trial, and to adjust the rights and liabilities of and give all necessary relief to all parties to the action or who have been served with the notice of trial, and shall embody all the results in the judgment.

Direction as to
time for sale

(2) The Judge or Local Judge who tries the action may order that the estate or interest charged with the lien may be sold, and when, by the judgment, a sale is directed of the estate or interest charged with the lien, the Judge or Local Judge who tries the action may direct the sale to take place at any time after judgment, allowing, however, a reasonable time for advertising such sale.

Directing sale
of materials.

(3) The Judge or Local Judge who tries the action may also direct the sale of any materials and authorize the removal thereof.

Letting in
lien-holders
who have not
proved their
claims at trial.

(4) Any lienholder, who has not proved his claim at the trial of any action to enforce a lien, on application to the Judge or Local Judge who tried the action on such terms as to

costs and otherwise as may be just, may be let in to prove his claim at any time before the amount realized in the action for the satisfaction of liens has been distributed, and where such a claim is proved and allowed, the Judge or Local Judge shall amend the judgment so as to include such claim therein.

(5) When a sale is had the Judge or Local Judge with whose approbation the lands are sold shall make a report on sale and therein direct to whom the moneys in Court shall be paid, and may add to the claim of the person conducting the sale his actual disbursements incurred in connection therewith, and where sufficient to satisfy the judgment and costs is not realized from the sale, he shall certify the amount of the deficiency and the names of the persons, with their amounts, who are entitled to recover the same, and the persons by the judgment adjudged to pay the same, and such persons shall be entitled to enforce the same by execution or otherwise as a judgment of the Court.

(6) Any lienholder for an amount not exceeding \$100, or any lienholder not a

Section 31.

Report where sale is had.

Attendance in person at trial by certain lien-holders.

Section 31.

party to the action, may attend in person at the trial of an action to enforce a lien, and on any proceedings in such action, or may be represented thereat or thereon by a solicitor or by an agent who is not a solicitor.

See Ont. Act, s. 35, *supra*, p. 150, to the same effect.

Section 32.

Notice of trial,
service of.

32. The party obtaining an appointment fixing the day and place of trial shall, at least eight clear days before the day fixed for the trial, serve a notice of trial, which may be in the form in the schedule to this Act, upon the solicitors for the defendants who appear by solicitors, and on all lienholders known to him, who have registered their liens as required by this Act, and on all other persons having any registered charge or incumbrance, or claim on the said lands, who are not parties, or who, being parties, appear personally in the said action, and such service shall be personal unless otherwise directed by the Judge or Local Judge who is to try the case, who may, in lieu of personal service, direct in what manner the notice of trial may be served.

See Ont. Act, s. 36, *supra*, p. 159, to the same effect.

33. Where more than one action is brought to realize liens in respect of the same property, a Judge or Local Judge having power to try such actions, may, on the application of any party to any one of such actions, or on the application of any other person interested, consolidate all such actions into one action, and may give the conduct of the consolidated action to any plaintiff in his discretion.

Section 33.

Consolidation
of actions.

See Ont. Act, s. 37, *supra*, p. 162, to the same effect.

34. Any lienholder entitled to the benefit of the action may apply for the carriage of the proceedings, and the Judge or Local Judge having power to try the action, may thereupon make an order giving such lienholder the carriage of the proceedings, and such lienholder shall for all purposes thereafter be the plaintiff in the action.

Section 34.

Transferring
carriage of
proceedings

See Ont. Act, s. 38, *supra*, p. 162, to the same effect.

35. In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is \$100 or less, the said judgment shall be final, binding, and without appeal, except, that upon application within

Section 35.

When judgment of court
of first
instance to be
final.

Section 35. fourteen days after judgment is pronounced, to the Judge or Local Judge who tried the same, he may grant a new trial.

See Ont. Act, s. 39 (1), *supra*, p. 163, to the same effect.

Section 36. **36.** In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is more than \$100, any party affected thereby may appeal therefrom to the Court of Queen's Bench in Term, whose judgment shall be final and binding, and no appeal shall lie therefrom. The procedure upon appeal from the judgment of a Local Judge shall be the same as upon appeal from a judgment of a Judge.

When appeal lies.

See Ont. Act, s. 39 (2), *supra*, p. 165, which contains somewhat similar provisions.

Section 37. **37.** The costs of the action awarded in any action under this Act, by the Judge or Local Judge trying the action, to the plaintiffs and successful lienholders shall not exceed in the aggregate an amount equal to twenty-five per cent of the amount of the judgment besides actual disbursements, and shall be in addition to the amount of the

Limit of costs to plaintiff.

judgment, and shall be apportioned and borne in such proportion as the Judge or Local Judge who tries the action may direct. Section 37.

See Ont. Act, s. 41, *supra*, p. 169, to the same effect.

38. Where the costs are awarded against the plaintiff or other persons claiming the lien, such costs shall not exceed an amount in the aggregate equal to twenty-five per cent. of the claim of the plaintiff and other claimants, besides actual disbursements, and shall be apportioned and borne as the Judge or Local Judge may direct. Section 38.
Limit of costs to be awarded against plaintiffs.

See Ont. Act, s. 42, *supra*, p. 171, to the same effect.

39. In case the least expensive course is not taken by a plaintiff under this Act the costs allowed to the solicitor shall in no case exceed what would have been incurred if the least expensive course had been taken. Section 39.
Costs where least expensive course not taken.

See Ont. Act, s. 43, *supra*, p. 173, to the same effect.

40. (1) The costs of and incidental to all applications and orders made under this Act and not otherwise provided for shall be in the discretion of the Judge or Local Judge to whom the application or by whom the order is made. Section 40.
Costs.

Section 40.

(2) Where a lien is discharged or vacated under section 24 of this Act or when in an action judgment is given in favour of or against a claim for a lien, in addition to the costs of an action the Judge or Local Judge may allow a reasonable amount for costs of drawing and registering the lien or for vacating the registration thereof.

See Ont. Act, ss. 44 and 45, *supra*, p. 173, 174, which embody the provisions contained in this *section* in inverse order.

Section 41.

Payments out
of Court.

41. In actions tried by a Local Judge, the Local Judge who tries the action shall, where money has been paid into Court and the time for payment out arrives, forward a requisition for cheques with a certified copy of his judgment, and (when one is made) of the report on sale, to the accountant of the Court of Queen's Bench, who shall, upon receiving the said requisition and copy of the judgment and report (if any) make out and return to the said Local Judge cheques for the amounts payable to the persons specified in the requisition, and the said Local Judge on receipt of said cheques shall distribute them to the persons entitled.

See Ont. Act, s. 46 (1), *supra*, p. 174, to the like effect.

42. No fees or stamps shall be payable on any cheques or proceedings to pay money into Court or obtain money out of Court in respect of a claim of lien, but sufficient postage stamps to prepay a return registered letter shall be enclosed with every requisition for cheques.

Section 42.

Fees and stamps not to be payable on payments out of Court.

See Ont. Act, s. 46 (2), *supra*, p. 175, to the like effect.

43. All judgments in favour of lien-holders shall adjudge that the person or persons personally liable for the amount of the judgment, shall pay any deficiency which may remain after sale of the property adjudged to be sold, and whenever on a sale of any property to realize a lien under this Act sufficient to satisfy the judgment and costs is not realized therefrom, the deficiency may be recovered against the property of such person or persons by the usual process of the Court.

Section 43.

Form of judgment in favour of lien-holders.

See Ont. Act, s. 47, *supra*, p. 176, to the like effect.

44. Whenever in an action brought under the provisions of this Act any claimant shall fail for any reason to establish a valid lien

Section 44.

Personal judgment when claim for lien fails by the usual process.

Section 44.

he may nevertheless recover therein a personal judgment against the party or parties to the action for such sum or sums as may appear to be due to him from him or them and which he might recover in an action in contract against such party or parties.

See Ont. Act, s. 48, *supra*, p. 177, to the same effect.

Section 45.

Forms.

45. The forms in the schedule hereto, or forms similar thereto or to the like effect may be adopted in all proceedings under this Act.

See Ont. Act, s. 49, *supra*, p. 178, to the same effect.

Section 46.

Liens arising
before Act
comes into
force.

46. This Act shall not apply to liens arising before the coming into force of this Act, excepting that where no action has been commenced or proceeding instituted to realize a lien arising before the coming into force of this Act the procedure herein directed shall be adopted to realize the same.

See Ont. Act, s. 50, *supra*, p. 179, to the like effect.

Section 47.

Repeal.

47. Except in so far as is necessary to preserve the liens and rights, causes of action and defences thereto arising or existing thereunder before the coming into force of this Act, the following Acts shall not apply

after the coming into force of this Act, and ^{Sect} _____
are hereby repealed :—

Chapter 97 of the Revised Statutes of
Manitoba ; Chapter 28 of 58 and 59 Victoria,
and Chapter 14 of 59 Victoria.

48. This Act shall come into force on the ^{Section 43.} _____
first day of June, 1898. <sub>Commence-
ment of Act.</sub>

SCHEDULE.

FORM 1.

Claim of Lien

A. B. (name of claimant) of (here state residence of claimant,) (if so, as assignee of, stating name and residence of assignor), under The Mechanics' and Wage-Earners' Lien Act, 1898, claims a lien upon the estate of (here state the name and residence of owner of the land upon which the lien is claimed), (a) in the undermentioned land in respect of the following work (service or materials), that is to say (here give a short description of the nature of the work done or materials furnished, and for which the lien is claimed), which work (or service) was (or is to be) done (or materials were furnished) for (here state the name and residence of the person upon whose credit the work is done or materials furnished), (b) on or before the

day of

The amount claimed as due (~~or~~ to become due) is the sum of \$_____.

The following is a description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*)

When credit has been given, insert: The said work was done (or materials were furnished) on credit, and the period of credit agreed to expired (or will expire) on the _____ day of _____, 18____

[illegible]

(a) See note (a), *supra*, p. 187.

(b) See note (b), *supra*, p. 187.

FORM 2.

Claim of Lien for Wages.

A. B (name of claimant) of (here state residence of claimant), (if so, as assignee of, stating name and residence of assignor), under The Mechanics' and Wage-Earners' Lien Act, 1898, claims a lien upon the estate of (here state the name and residence of the owner of land upon which the lien is claimed) (a) in the undermentioned land in respect of days' work performed thereon while in the employment of (here state the name and residence of the person upon whose credit the work was done) on or before the day of

The amount claimed as due is the sum of \$

The following is the description of land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

Dated at

this

day of

(*Signature of claimant.*)

(a) See note (a) *supra*, p. 187.

FORM 3.

Claim of Lien for Wages by Several Claimants.

The following persons, under The Mechanics' and Wage-Earners' Lien Act, 1898, claim a lien upon the estate of (*here state the name and residence of the owner of land upon which the lien is claimed*) (a) in the undermentioned land in respect of wages for labor performed thereon while in the employment of (*here state name and residence or names and residences of employers of the several persons claiming the lien*).

A. B., of (<i>residence</i>)	\$	for	days' wages.
C. D.,	"	\$	for days' wages.
E. F.,	"	\$	for days' wages.

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

Dated at this day of

(*Signature of the several claimants.*)

(a) See note (a) *supra*, p. 187.

FORM 4.

Affidavit Verifying Claim.

I, *A. B.*, named in the above (*or* annexed) claim, do make oath that the said claim is true.

Or, We, *A. B.* and *C. D.*, named in the above (*or* annexed) claim, do make oath, and each for himself saith that the said claim, so far as relates to him, is true.

(*Where affidavit is made by agent or assignee, a clause must be added to the following effect: I have full knowledge of the facts set forth in the above (or annexed) claim.*)

Sworn before me at _____, in _____
 of _____, this _____
 day of _____, A. D., 18 _____

Or, The said *A. B.* and *C. D.* were sever-
 ally sworn before me at _____, in the _____
 of _____, this _____ day of _____,
 A.D., 18 _____.

Or, The said *A. B.* was sworn before me
 at _____, in the _____ of _____,
 this _____ day of _____, A.D., 18 _____.

FORM 5.

Affidavit Verifying Claim in Commencing an Action.

(Style of Court (a) and Cause.)

I, _____, make oath and say, that I have read, or heard read, the foregoing claim of lien (*b*), and I say that the facts therein set forth are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect of my lien is the just and true amount due and owing to me after giving credit for all the sums of money or goods or merchandise to which (*naming the debtor*) is entitled to credit as against me.

Sworn, etc.

FORM 6.

Certificate of Lis Pendens.

(Style of Court and Cause.)

I certify that the above named plaintiff has commenced an action in the above Court to enforce against the following land (*describing it*) a claim of Mechanics' Lien for \$ _____.

Dated this _____ day of _____, A.D., 18 ____.

Prothonotary.

(a) All actions to enforce mechanics' liens are to be brought in the Queen's Bench, no matter what the amount of the plaintiff's claim may be: see *section 27 (1), ante*, p. 229.

(b) No form of a statement of claim is given in the Act, a form, however, will be found, *post*, in the Appendix.

FORM 7.

Defence.

(Style of Court and Cause.)

A. B., disputes that the plaintiff is now entitled to a mechanic's lien on the following grounds; (*setting forth the grounds shortly*).

(a) That the lien has not been prosecuted in due time, as required by statute.

(b) That there is nothing due to the plaintiff.

(c) That the plaintiff's lien has been vacated and discharged.

(d) That there is nothing due by _____ (*the owner*) for the satisfaction of the plaintiff's claim.

Delivered on the _____ day of _____ by *A. B.* in person,
whose address for service is *(stating address within two miles of the
court house)*, or

Delivered on the _____ day of _____ by V. Z., solicitors
for the said A. B.

NOTE—If the owner does not dispute the lien entirely, and only wishes to have the accounts taken, he may use the following form:—

FORM 8.

Defence where there are no Matters Disputed or where the Matters in Dispute are Matters of Account.

(Style of Court and Cause.)

A. B. admits that the plaintiff is entitled to a lien and claims that the following is a just and true statement of the account in question :—

Amount of contract price for work contracted to be performed by *E. F.* as plumber, on the lands in question herein \$500.00

Amounts paid on Account.

June 1st, 1898, paid <i>E. F.</i> ..	\$200.00
July 1st, 1898, paid <i>G. H.</i> and <i>I. K.</i> , sub-contractors of <i>E. F.</i> ..	100.00
	<hr/> \$300.00

Balance admitted to be due \$200.00

For satisfaction of lien of plaintiff and other lien-holders (*as the case may be*) *A. B.*, before action tendered to the plaintiff \$ in payment of his claim, and now brings into Court \$ and submits that that amount is sufficient to pay the plaintiff's claim, and asks that this action be dismissed as against him with costs.

Delivered, etc.

FORM 9.

Affidavit of Owner Verifying Account.

(*Style of Court and Cause.*)

I, *A. B.*, of _____ being the owner of the lands in question in this action, make oath and say: That the account set forth in the foregoing defence is a just and true account of the amount of the contract price agreed to be paid by me to *E. F.* for the work contracted to be done by him on the lands in question.

The said account also justly and truly sets forth the payments made by me on account thereof, and the person or persons to whom the same were made; and the balance of [\$200] appearing by such account to be still due and payable is the just and true sum now due and owing by me in respect of my contract with the said *E. F.*

Sworn, etc.

FORM 10

Notice of Trial

(Style of Court and Cause.)

Take notice that this action will be tried at the court house, in the _____ of _____, on the _____ day of _____ by _____ and at such time and place the _____ will proceed to try the action and all questions which arise in or which are necessary to be tried to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him, or upon whom this notice of trial has been served, and at such trial he will take all accounts, make all inquiries and give all directions and do all things necessary to try and otherwise finally dispose of this action, and of all matters, questions, and accounts arising in said action, and will give all necessary relief to all parties.

And further take notice, that if you do not appear at the trial and prove your claim, if any, or prove your defence, if any, to the action, the proceedings will be taken in your absence and you may be deprived of all benefit of the proceedings and your rights disposed of in your absence.

This is a mechanics' lien action brought by the above named plaintiff against the above named defendants to enforce a mechanics lien against the following lands: *(set out description of lands)*.

This notice is served by, etc.

FORM 11.

*Statement of Account by Lienholders, not parties to the action.**(Style of Court and Cause.)**E. F.**Dr. to G. H.*

1898.

Jan. 1, To 12 doz. brackets	\$12.00
Feb. 3, To 50 lbs. of nails	5.00
Oct. 3, To 40 sheets of glass	40.00
	<hr/>
	\$57.00

Cr.

1898.

Feb. 4, By cash	\$ 4.00
June 5 By goods	20.00
	<hr/>
	\$24.00
	<hr/>
	\$33.00

FORM 12.

*Affidavit of Lienholder Verifying Claim.**(Style of Court and Cause.)*I, *G. H.*, of (*address and occupation*), make oath and say :

I have in the foregoing account (*or* in the account now shown to me, marked A), set forth a just and true account of the amount due and owing to me by *E. H.* (*the owner*) [*or* by *E. F.*, who is a contractor with the defendant, *L. G.*, (*the owner*)], of the lands in question, and I have in the said account given credit for all sums in cash or merchandise or otherwise to which the said *E. F.* is justly entitled to credit in respect of the said account, and the sum of \$33 appearing by such account to be due to me as the amount (*or* balance) of such account is now justly due and owing to me.

Sworn, etc.

FORM 13.

Judgment.

In the Court of Queen's Bench.

Monday the 10th July, 1898.

Name of Judge (or Local Judge.)

Plaintiff,

and

Defendant.

This action coming on for trial before
in at
upon opening of the matter and it appearing that the following
persons have been duly served with notice of trial herein (*set out
names of all persons served with notice of trial*) and all such persons
(*or as the case may be*) appearing at the trial, (*if so*, and the following
persons not having appeared, (*set out the names of non-appearing per-
sons*), and upon hearing the evidence adduced and what was alleged
by counsel for the plaintiff and for *C. D.* and *E. F.* and the defendant
(*if so*, and by *A. B.* appearing in person).

1. This Court doth declare that the plaintiff and the several
persons mentioned in the first schedule hereto are respectively
entitled to a lien under The Mechanics' and Wage Earners' Lien Act,
1898, upon the lands described in the second schedule hereto, for
the amounts set opposite their respective names in the first, second,
and third columns of the said first schedule, and the persons primarily
liable for the said claims respectively are set forth in the fourth
column of the said schedule.

2. (*If so.*) (And this Court doth further declare that the several
persons mentioned in Schedule 3 hereto are also entitled to some
lien, charge or incumbrance upon the said lands for the amount

set opposite their respective names in the fourth column of the said Schedule 3.)

3. And this Court doth further order and adjudge that upon the defendant (*A. B.*, the owner) paying into Court to the credit of this action the sum of _____ (*gross amount of liens in Schedules 1 and 3 for which owner is liable*) on or before the _____ day of _____ next, that the said liens in the said first schedule mentioned be and the same are hereby discharged, (and the several persons in the said third schedule are to release and discharge their said claims and assign and convey the said premises to the defendant (*owner*) and deliver up all documents on oath to the said defendant (*owner*) or to whom he may appoint) and the said moneys so paid into Court are to be paid out in payment of the claims of the said lienholders (*if so, and incumbrancers*).

4. But in case the said defendant (*owner*) shall make default in payment of the said moneys into Court as aforesaid, this Court doth order and adjudge that the said lands be sold with the approbation of the Master of this Court (at _____) and that the purchase money be paid into Court to the credit of this action, and that all proper parties do join in the conveyances as the said Master shall direct.

5. And this Court doth order and adjudge that the said purchase money be applied in or towards payment of the several claims in the said first (and third) schedule(s) mentioned as the said Master shall direct, with subsequent interest and subsequent costs to be computed and taxed by the said Master.

6. And this Court doth further order and adjudge that in case the said purchase money shall be insufficient to pay in full the claims of the several persons mentioned in the said first schedule, the persons primarily liable for such claims as shown in the said first schedule do pay to the persons to whom they are respectively

SCHEDULE 3.

Names of persons entitled to Incumbrances other than Mechanics' Liens	Amount of debt and interest (if any).	Costs.	Total.

(Signature of officer issuing judgment.)

FORM 14.

Certificate Vacating Lien.

(Style of Court and Cause.)

Date.

I certify that the defendant *A. B. (the owner)* has paid into Court to the credit of this cause all money due and payable by him for the satisfaction of the liens of the plaintiff and *E. F., G. H., I. J., and K. L.*, and their liens are hereby vacated and discharged so far as the same affect the following lands (*describe lands*).

(Signature of Master or Referee).

FORM 15.

Certificate Vacating Lien.

(Style of Court and Cause.)

Date.

I certify that I have inquired and find that the plaintiff is not entitled to any mechanics' lien upon the lands of the defendant *A. B.* (*the owner*) and that his claim of lien is hereby vacated and discharged so far as the same affects the following lands (*describe lands*).

(Signature of Master or Referee).

Revised Statutes of British Columbia. (1897.)

CHAPTER 132.

AN ACT FOR THE BENEFIT OF MECHANICS AND LABOURERS.

HER MAJESTY, by and with the advice
and consent of the Legislative Assem-
bly of the Province of British Columbia,
enacts as follows :—

Short Title.

1. This Act may be cited as the “Me-
chanics’ Lien Act.” 1891, c. 23, s. 1.

Section 1.
Short title.

Interpretation.

2. In the construction of this Act—

Section 2.

(1.) “Contractor” shall mean a person
employed directly by the owner for the doing
of work for any of the purposes mentioned
in this Act :

Interpretation
“Contractor.”

Section 2.

"Sub-con-
tractor."

(2.) "Sub-contractor" shall mean a person not contracting with or employed directly by the owner for the purpose aforesaid, but contracting with or employed by the contractor, or under him by another sub-contractor, to do the whole or a certain portion of the work, but a person doing manual or mental labour for wages shall not be deemed a sub-contractor :

"Owner."

(3.) "Owner" shall extend to and include a person having any estate or interest, legal or equitable, in the lands upon or in respect of which the work is done, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work is done, and all persons claiming under him whose rights are acquired after the work in respect of which the lien is claimed is commenced :

"Works or
improve-
ments."

(4.) "Works or Improvements" shall include every act or undertaking for which a lien may be claimed under this Act :

"Labourer."

(5.) "Labourer" shall mean, extend to, and include every mechanic, artisan, builder, or other person doing labour for wages.

1891, c. 23, s. 2.

See Ont. Act, s. 2, *supra*, p. 4. The definitions of contractor and sub-contractor are practically the same as in the Ontario Act, down to the word "sub-contractor" in the fifth line of s.-s. (2), but this Act excludes from the definition of "sub contractor" two classes who would come within the definition in the Ontario Act, viz., (1), persons doing manual labour for wages, and (2), persons doing mental labour for wages. The effect of this variation, when taken in connection with *section 4, infra*, would appear to be, to exclude from any right of lien, all persons working for wages whether mentally or manually, unless they are employed directly by the owner; but see *post section 22 (2), infra*, p. 281. See also *section 12, infra*, p. 274.

The definition of 'owner' is more elaborate in the Ontario Act than in this Act even with the help of R. S. B. C., c. 1, s. 3. The Ontario Act includes, firms, associations, municipal corporations, and railway companies, to none of which does the definition in this Act expressly extend. It may however be remarked that the definition here given does not pretend to be exhaustive, but the Act merely says that the word 'owner' "shall extend to and include a person, etc." but *non constat* it does not also extend to, and include firms, and associations, companies and corporations, specifically enumerated in the Ont. Act.

Application.

3. This Act shall apply to any contract made or work begun previous to the passage hereof, but only so far as regards any moneys

Section 2.

Section 3.

Application.

Section 3. remaining unpaid and as respects any such unpaid moneys. 1891, c. 23, s. 3.

There is no similar provision to this in the Ont or Manitoba Acts.

Nature of Liens.

Section 4.
Mechanics
and others to
have liens for
work done,
etc.

4. Unless there is an agreement in writing to the contrary, signed by the person claiming the lien, every contractor, sub-contractor, and labourer doing or causing work to be done upon the construction, erection, alteration, or repair, either in whole or in part of, or addition to, any building, erection, wharf, bridge, or other work, or doing or causing work to be done upon or in connection with the clearing, excavating, filling, grading, draining, or irrigating any land in respect of a railway, mine, sewer, drain, ditch, flume, or other work, or improving any street, road, or sidewalk adjacent thereto, at the request of the owner of such land, shall, by virtue of such work, have a lien or charge for the price of such work, upon such building, erection, wharf, machinery, fixtures, or other works, and all materials furnished or procured for use in constructing or making such works or improvements, so long as the same are

about to be in good faith worked into or made part of the said works or improvements, and the land and premises occupied thereby, or enjoyed therewith, but limited in amount as hereinafter mentioned : Provided, such lien shall affect only such interest in the said land as is vested in the owner at the time the contract is made, or any greater interest which the owner may acquire during the progress of the works or improvements.
1891, c. 23, s. 4.

Section 4.

See Ont. Act, s. 4, *supra*, p. 18 ; see also s. 7, *supra*, p. 41. The enumeration of the species of work in respect of which a lien may be claimed is more specific in the Ont. Act. But for the Act, no lien exists, and it is only so far as the Act specifically creates a lien, that it can have any existence. For any kind of work, fairly coming within any of the classes specified, a lien may be claimed, but for work not coming within any of such classes, no lien can arise. The lien can only be claimed under this Act (*a*) in respect of work done or caused to be done "upon the construction, alteration or repair in whole or in part of, or addition to, any building, erection, wharf, bridge or other work" (presumably similar to those enumerated) ; or (*b*) for "doing or causing work to be done upon or in connection with the clearing, excavating, filling, grading, draining, or irrigating any land *in respect of* a railway, mine, sewer, drain, ditch, flume or other work" (presumably similar to those enumer-

Section 4. ated); or (c) for "improving any street, road or sidewalk adjacent thereto at the request of the owner of such land." The words "at the request of the owner of such land" are probably intended to apply also to the classes of work (a) and (b) *supra*, as well as to class (c). At the same time there is a difficulty in so applying them, as the Act obviously intends to give sub-contractors (not being labourers working for wages) a lien, and yet the contract of a sub-contractor is not made with the owner, and he does not perform his work at the owner's request. In order to entitle a sub-contractor to a lien, it would probably be held to suffice that his work was done in pursuance of a request from the owner to the contractor through whom such sub-contractor claims: see *section 7, infra*. The effect of excluding labourers working for wages from the definition of "sub-contractor" (see *section 2 (2)*) is practically to exclude such labourers from any right to a lien under this *section* unless they are employed by the owner; but see *section 22 (2), infra*, p 281.

Clearing land for the purpose of cultivation does not appear to give rise to any lien, nor would the excavation of land, unless it be for some of the purposes enumerated.

It has been held that no lien can be claimed under the Act against a railway under the control of the Dominion Government: *Larsen v. Nelson and Fort S. Ry.*, 4 B. C. R. 151.

It was pointed out by Begbie, C. J., in *Haggerty v. Grant*, 2 B. C. R. 173, that this Act in express terms only confers a lien for work and labour, and not for materials; the words "and all materials furnished" in this

Section show that though the material man has no lien, yet that the lien for work will attach on materials furnished, and that such lien is not confined to materials actually incorporated in the buildings or erections on the land, but includes those "about to be in good faith worked into or made part of the works or improvements"; under *section* 11, if the lien once attaches on materials they cannot be removed, even though payment therefor be refused; material men have therefore need to be cautious about supplying materials without first receiving payment. Whether a lien-holder is entitled to a lien on materials supplied by some third party and "about to be in good faith" incorporated, but not actually incorporated, in the building in respect of which the lien exists, may be a question of some difficulty. There seems to be some ground in natural justice, why the lien on materials not incorporated should be restricted to those furnished by the person claiming the lien. The lien would appear in any case only to attach on the interest of the person who is 'owner' as defined by *section* 2, *i.e.*, a person on whose behalf or with whose privity the work has been done; and in the case of materials not paid for, his interest would be subject to any claim or lien his vendor might have thereon.

Section 4.

No distinction is made, as in the Ontario and Manitoba Acts, respecting claims against lessors and lessees, but, it is assumed, that under this Act, as under the Ont. Act, where the lien-holder is only employed by a lessee, he can only charge the lessee's interest, and not that of the reversioner, unless the latter is also a party to the contract, or agrees that his estate shall be subject to the

Section 4. lien. See Ont. Act, s. 7 (2), *supra*, p. 41 ; see however *infra*, s. 7, p. 267.

Section 5.
Amount to
which lien
is limited.

5. Such lien shall be limited in amount to the sum actually owing to the person entitled to the lien, and distribution of any moneys derived from the realization of the liens shall be made in accordance with the twenty-second section of this Act. 1891, c. 23, s. 5.

See Ont. Act, s. 4, *supra*, p. 18.

Although the lien-holder cannot, of course, recover more than is due to him, he may not be able to recover as much, for though the Act does not say so in terms, yet it seems manifest that the amount recoverable must be limited not only by what is due to the lien-holder, but also by what is due from the owner. This limitation is actually expressed in the Ont. Act, s. 4, and, it is submitted, it is implicitly a limitation of the lien-holder's right under this Act. See *section 14, infra*, p. 277.

As to sub contractors, see note to *section 2, supra*, p. 261.

Section 6.
Liens on
mortgaged
premises.

6. Where works or improvements are put upon mortgaged premises, the liens, by virtue of this Act, shall be prior to such mortgage, as against the increase in value of the mortgaged premises by reason of such works or improvements, but not further, unless the same is done at the request of the mortgagee,

Section 6.

in writing ; and the amount of such increase shall be ascertained upon the basis of the selling value upon taking of the account, or by the trial of an issue as provided in the sixteenth section hereof, and thereupon the Judge may, if he shall consider the works or improvements of sufficient value to justify the proceedings, order the mortgaged premises to be sold at an upset price equal to the selling value of the premises immediately prior to the commencement of such works or improvements (to be ascertained as aforesaid), and any sum realized in excess of such upset price shall be subject to the liens provided for by this Act. The moneys equal to the upset price as aforesaid shall be applied towards the said mortgage or mortgages, according to their priority. Nothing, however, in this section shall prevent the lien from attaching upon the equity of redemption or other interest of the owner of the land subject to such mortgage or charge. 1891, c. 23, s. 6.

See Ont. Act, s. 7 (3), *supra*, p. 42.

Section 7.

7. Every building or other improvement mentioned in the fourth section of this Act, Owner of land deemed

Section 7.
to have au-
thorized the
erection of
buildings
thereon.

constructed upon any lands with the knowledge of the owner or his authorized agent, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner, or person having or claiming any interest therein, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement thereon. 1891, c. 23, s. 7.

How far this *section* would affect a landlord whose tenant was erecting or improving any building on the demised land, is a question of some difficulty. As a matter of precaution it would seem safer to assume, in the absence of any adjudication to the contrary, that the interest of the landlord would be bound unless he complied with this *section*. Nothing but actual knowledge would seem to bind any third person whose interest is sought to be affected: and the *onus* would appear to be on the lien-holder claiming against such third person to show that he had actual knowledge of the work. See Ont. Act, s. 5, *supra*, p. 38.

Registration and Transmission.

Section 8.

8. Every lien upon any such building, erection, mine, works or improvements, or land, shall absolutely cease to exist after the expiration of thirty-one days after the work shall have been completed, or after the claimant has ceased to work thereon from any cause (provided, however, that any labourer shall not be held to have ceased work upon any building, erection, mine, works or improvements, until the completion of the same, if he has in the meantime been employed upon any other work by the same contractor), unless in the meantime the person claiming the lien shall file in the office of the Government Agent in the city, town, or district wherein the land is situate, and in case there shall be no Government Agent in such city, town, or district, then in the office of the Registrar-General of Titles, or in the office of the nearest District Registrar of Titles, an affidavit, sworn before any person authorized to take oaths, stating, in substance :—

Lien expires
in 31 days
after com-
pletion of
work unless
registered.

Mode of
registration.

- (a) The name and residence of the claimant, and of the owner of the property or interest to be charged :

Section 8.
—

- (b) The particulars of the kind of work done :
- (c) The time when the work was finished or discontinued :
- (d) The sum claimed to be owing, and when due :
- (e) The description of the property to be charged :

Which affidavit shall be received and filed as a lien against such property, interest or estate. The Registrar-General, District Registrar, and every Government Agent shall be supplied with printed forms of such affidavits, in blank, which may be in the form or to the effect of Schedule A to this Act, and which shall be supplied to every person requesting the same, and desiring to file a lien. Every Government Agent, the Registrar-General and District Registrar of Titles, shall keep an alphabetical index of all claimants of liens and the persons against whom such liens are claimed, which index shall be open for inspection during office hours, and it shall be the duty of such Government Agent, Registrar-General of Titles or District Registrar to decide whether his is or not

the proper office for the filing of such affidavit, and to direct the applicant accordingly ; and no affidavit shall be adjudged insufficient on the ground that it was not filed in the proper office.

Section 8.

In order to make the proviso in the first part of this section consistent with sections 2 and 4, *supra*, the word "contractor" should read "owner" ; because the effect of sections 2 and 4, as already pointed out, appears to be, to exclude labourers employed by anyone but the owner from any right to a lien under the Act.

See Ont. Act, ss. 17-24, *supra*, pp. 95-123. Under that Act, s. 19, *supra*, p. 103, a substantial compliance with its requirements is sufficient. Under this Act however it is said that "in order to acquire a right of this very unusual nature the statute must be strictly followed" : *per* Begbie, C. J., *Haggerty v. Grant*, 2 B. C. R. 176, and see *Weller v. Shupe*, 6 B. C. R. 58. Non-compliance with the provisions of this section may therefore invalidate a claim of lien : see *Larsen v. Nelson and Fort S. Ry.*, 4 B. C. R. at p. 152 ; *Smith v. McIntosh*, 3 B. C. R. 26, (a decision under the Act of 1888).

See further provisions as to the affidavit in section 9, *infra*, p. 272.

Owing to this Act giving no lien for materials, it is important, and absolutely necessary, to distinguish in the affidavit between what is claimed for materials, and work, respectively, and the omission to do so has in two cases been held fatal to the right of lien : *Knott v. Cline*, 5 Man. 120 ; *Weller v. Shupe*, 6 B. C. R. 58.

Registration of the lien under this section is necessary in all cases before action.

Section 8. The time for bringing an action to enforce the lien is regulated by *section 24, infra*, p. 284.

Section 9.

In works of over \$500 contractor must file statement showing work to be done, etc.

9. When any works, buildings, or improvements upon any lands, mine or premises are about to be done, erected or made, and the contract price or estimated cost thereof shall exceed five hundred dollars, the owner or contractor (if any) shall file or cause to be filed in the office of the Government Agent in the city, town, or county wherein the land is situated, and in case there shall be no Government Agent in such city, town, or county then in the Land Registry office of the Land Registry District within the limits of which such lands, mine or premises are situate, a statement setting forth the particulars of the works or improvements to be done, erected or made, the name and address of the owner, the nature of his interest in the land, the name and residence of the contractor (if any), and the estimated cost or contract price of the works or improvements, which statement shall be signed by the said owner and contractor (if any), or by some person duly authorized to sign the same by him or them. Such statement may be in the

form of Schedule B annexed to this Act. Section 9.
 Any affidavit made under section eight of this Act, which shall be in accordance with such statement so filed as above provided, shall be deemed sufficient to sustain any lien, even though the facts of the case should vary therefrom; and where no such certificate is filed no affidavit shall be adjudged to be insufficient, if it describes the owner, contractor (if any), and works or improvements, so as to leave no doubt upon the mind of the Court or Judge as to who and what are intended to be described. 1891, c. 23, s. 9.

No *section* corresponding to this, is to be found in the Ont. Act. See, however, *section 29, supra*, p. 137.

10. In the event of the death of the lienholder his lien shall pass to his personal representatives, and the right of a lienholder may be assigned by any instrument in writing, subject to the limitation contained in the twelfth section hereof. 1891, c. 23, s. 10. Section 10.
Liens pass on death to legal representatives, or may be assigned.

See Ont. Act, s. 26, *supra*, p. 128.

Security.

11 During the continuance of any lien no portion of the property affected thereby shall Section 11.
During continuance of lien property must not be removed.

Section 11. be removed to the prejudice of such lien, and any attempt at such removal may be restrained on application to the Judge of the County Court nearest to which the land is situate. 1891, c. 23, s. 11.

See Ont. Act, s. 16. *supra*, p. 90.

Section 12. **12.** No contractor, or sub-contractor, shall be entitled to demand or receive any payment in respect of any contract, where the contract price exceeds five hundred dollars, until he, or some person in charge of the works or improvements, shall post upon the works or improvements a copy of the receipted pay-roll, from the hour of 12 m. to the hour of 1 p.m., on the first legal day after pay day, and shall have delivered to the owner, or other person acting on his behalf, the original pay-roll containing the names of all labourers who have done work for him upon such works or improvements, with a receipt in full from each of the said labourers, with the amounts which were due and had been paid to each of them set opposite their respective names, which pay-roll may be in the form of Schedule C hereto, and no payment made by the owner without the delivery of such pay-roll

Receipted
pay-rolls to be
posted on
works.

shall be valid for the purpose of defeating or diminishing any lien upon such property, estate or interest in favour of any such labourer. No assignment by the contractor, or any sub contractor, of any moneys due in respect to the contract shall be valid as against any lien given by this Act. As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset or counter-claim in favour of the owner against the contractor. 1891, c. 23, s. 12. Section 12.

There is no similar provision to this in the Ont. Act. See, however, *section 13 (1)* of that Act, *supra* p. 72.

This *section* is apparently intended to be for the benefit of the "labourer." This class of workmen, unless employed by the owner himself, does not appear to be entitled to a lien on the land on which the work is performed, it seems open to doubt, therefore, whether a payment by an owner contrary to the provisions of this *section* could be successfully attacked by any labourer doing manual or mental labour for wages, employed by any contractor or sub-contractor: see notes to *sections 2* and *4*, *supra*, pp. 261, 263.

Enforcement.

13. Any number of lienholders may be joined in one suit, and all suits or proceed- Section 13.
Consolidated
liens.

Section 13. ings brought by a lienholder shall be taken to be brought on behalf of all lienholders who may be made parties to such suits or proceedings within the time mentioned in the twenty-fourth section hereof: Provided that the moneys realized in such suit shall be distributed amongst the lienholders, parties to such suit or proceedings, in the order and manner provided in the twenty-second section of this Act. Any lienholder not originally joined may be made a party to such suit or proceedings by order of a Judge, upon ex parte application supported by an affidavit stating the particulars of the claim, and any lienholder so joined in any such suit or proceedings shall be deemed to have complied with the twenty-fourth section of this Act as fully as if he had instituted a suit in his own behalf. 1891, c. 23, s. 13.

Under this Act the action to enforce a lien must be commenced in the ordinary way. Under the Ont. Act a special mode of procedure is also provided: see Ont. Act, s. 31, *supra*, p. 140.

The Ont. Act, s. 32, *supra*, p. 145, contains somewhat similar provisions to this as to parties, except that this Act limits the time for persons not originally named as parties to be brought in.

14. If more than one suit is commenced in respect of the same contract, the owner or contractor shall apply to have the causes consolidated, and failing to do so he shall pay the cost of such additional suit or suits. The owner complying with the provisions of this Act shall not be liable for any greater sum than he has agreed to pay by contract. 1891, c. 23, s. 14.

Section 14.

Owner may apply to have suits consolidated.

See Ont. Act, s. 37, *supra*, p. 162, and see *section 15, infra*.

This *section* casts on the owner or contractor the duty of applying to consolidate actions, and imposes a penalty if they do not. Under the Ont. Act any party may apply, but no duty to apply is imposed. Extra costs occasioned by not consolidating would probably not be recoverable under that Act: see Ont. Act, s. 43, *supra*, p. 173.

15. If two or more actions are brought in respect of the same contract or work, the Court or Judge shall, by order, on the application of any person interested, consolidate all the actions, and may make such order as to costs as he shall think fit. 1891, c. 23, s. 15.

Section 15

Judge may order consolidation of actions.

See Ont. Act, s. 37, *supra*, p. 162.

Section 16.

Suits to be
brought in
County Court.

16. Whatever the amount of lien or liens, proceedings may be taken before a Judge of the County Court of the county in which the land charged is situate, who is hereby authorized and empowered to proceed in a summary manner by summons and order, and he may take accounts and make requisite inquiries, try issues, and in default of payment may direct the sale of the estate or interest charged, and such further proceedings may be taken for the purpose aforesaid as the Judge may think proper in his discretion, and any conveyance under his seal shall be effectual to pass the estate or interest sold, and the fees and costs in all proceedings taken under this section shall be such as are payable according to the ordinary procedure of the said Court. And, when not otherwise provided, the proceedings shall be, as nearly as possible, according to the practice and procedure in force in the County Court; and, when these are no guide, the practice and procedure used in the Supreme Court shall be followed, provided an appeal shall lie from any judgment or order of the said Court in like manner as in ordinary cases. 1891, c. 23, s. 16.

The jurisdiction to enforce all mechanics' liens is by this *section* conferred on the County Courts, irrespective of the amount sought to be recovered. The Supreme Court has no original jurisdiction, therefore, in such actions : *Martin v. Russell*, 2 Man. 98. As to time for commencing action : see *section* 24, *infra*, p. 284.

17. Any person against whose property a lien has been registered under the provisions of this Act, may apply to a Judge of the County Court, on an affidavit setting forth the registry of the same, and that hardship or inconvenience is experienced, or is likely to be experienced thereby, with the reasons for such statement, for a summons calling upon the opposite party to show cause why such lien should not be cancelled upon sufficient security being given. Such summons, together with a copy of the affidavit on which the same is granted, shall be served on the opposite party and made returnable in three days after the issuing thereof, or in such greater or less time as the Judge may direct.

1891, c. 23, s. 17.

See Ont. Act, s. 27, *supra*, p. 129.

18. On the return of such summons, the Judge may order the cancellation of such lien, either in whole or in part, upon the

Section 16.

Section 17.

Summons to show cause why lien should not be cancelled.

Section 18.

Judge may order cancellation of lien.

Section 18.

giving of security by the party against whose property the said lien is registered to the opposite party, in an amount satisfactory to the said Judge, and upon such other terms, if any, as the Judge may see fit to impose. 1891, c. 23, s. 18.

See Ont. Act, s. 27, *supra*, p. 129.

Section 19.

On Judge's
order lien to
be cancelled.

19. The Registrar-General, District Registrar, or Government Agent in whose office the said lien is registered shall, on the production of such order, file the same and cause the said lien to be cancelled as to the property affected by the order. 1891, c. 23, s. 19.

See Ont. Act, s. 27, *supra*, p. 129.

Section 20.

In certain
cases owner
or contractor
to pay costs.

20. When it shall appear to the Court or Judge in any proceedings to enforce a lien or liens under this Act that such proceedings have arisen from the failure of any owner or contractor to fulfil the terms of his contract or engagement for the work in respect of which the liens are sought to be enforced, or to comply with the provisions of this Act, such Court or Judge may order the said owner or contractor or either of them, to pay

all the costs of such proceedings, in addition Section 20.
 to the amount of the contract or sub-contract, or wages due by him or them to any contractor, sub-contractor, or labourer, and may order a final judgment against such contractor or owner, or either of them, in default for such costs, with execution as provided in section 16 of this Act. 1891, c. 23, s. 20.

See Ont. Act, s. 45, *supra*, p. 174.

21. If the property sold in any proceedings under this Act shall be a leasehold Section 21.
Leasehold property.
 interest, the purchaser at any such sale shall be deemed to be the assignee of such lease. 1891, c. 23, s. 21.

There is no corresponding *section* in the Ont. Act, but it would seem that this provision is merely declaratory of what the law would be in its absence. Where the interest of a lessee is sold under legal proceedings the purchaser becomes his assign by operation of law, and bound by all covenants running with the land : see Foa's *Landlord and Tenant*, p. 347.

22. All moneys realized by proceedings under this Act shall be applied and distributed Section 22.
Distribution of proceeds of sale under Act
 in the following order :—

(1.) The cost, of all the lienholders of and

Section 22.

incidental to the proceedings, and of registering and proving the liens:

- (2.) The balance shall then be divided by first paying six weeks' wages (if due) to all labourers employed by the owner, contractor, and sub-contractors (provided such balance shall be sufficient to pay six weeks' wages as aforesaid, but if not, then amount shall be divided pro rata among the said labourers), and the balance remaining, after paying six weeks' wages as aforesaid, shall be divided pro rata among the sub-contractors and other persons employed by the owner and contractor, after all labourers, sub-contractors, and other persons employed by the owner and contractor, have been paid their liens and costs, the balance shall be paid to the contractor. 1891, c. 23, s. 22.

The Ont. Act does not definitely direct how the proceeds of a sale are to be distributed, but leaves that to be determined by the Court, according to the circumstances of each case.

In applying this *section*, the provision of *section 6* would

have to be regarded, and, where there is a prior mortgage, so much of the purchase money as equalled the upset price must be applied, notwithstanding this *section*, in accordance with the provisions of *section* 6.

Section 22.

This *section* seems to fail to take into account, the case of there being different classes of sub-contractors, some of whom may not be entitled to an equal share with others. In the distribution of the proceeds of a sale, however, even under this *section*, it is presumed that it would be so made as to preserve the obvious equities of the lien-holders, and so that the money rightfully due to A shall not be applied to satisfy the creditors of B.

Sub-section 2 provides for the payment of labourers employed by contractors and sub-contractors as well as those employed by the owner, though none but the latter would appear to be entitled to liens under the Act : see *sections* 2 and 4 and notes, *supra*, pp. 261, 263 ; see also *section* 12 and notes, *supra*, p. 275.

23. Every mechanic or other person who has bestowed money or skill and materials upon any chattel in the alteration and improvement of its properties, or increasing its value, so as thereby to become entitled to a lien upon such chattel or thing for the amount or value of the money, skill, or materials bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been

Section 23.

Mechanics' lien on chattels.

Section 23.

paid, have power to sell the chattel in respect of which the lien exists, on giving two weeks' notice by advertisement in a newspaper published in the city, town, or county in which the work was done, or in case there is no newspaper published in such city, town, or county, then in a newspaper published nearest thereto, stating the name of the person indebted, the amount of his indebtedness, a description of the chattel to be sold, the time and place of sale; and after such sale, such mechanic or other person shall apply the proceeds of such sale in payment of the amount due to him, and the costs of advertising and sale, and shall pay over the surplus (if any) to the person entitled thereto on application being made to him therefor, and a notice in writing of the result of the sale shall be left at or posted to the address of the owner at his last known place of abode or business. 1891, c. 23, s. 23.

See Ont. Act, s. 51, and notes, *supra*, pp. 179-186.

Expiration, Cancellation, and Discharge.

Section 24.
When a lien
shall expire.

24. Every lien shall absolutely cease to exist after the expiration of thirty days after

the filing of the affidavit mentioned in section 8 of this Act, unless the claimant in the meantime shall have instituted proceedings to realize his lien under the provisions of this Act, and a certificate of the Judge or Registrar of the Court wherein the proceedings are commenced, certifying that such action has been commenced, is duly filed in the office of the Government Agent in the city, town, or district wherein the land is situate, and in case there shall be no Government Agent in such city, town, or district, then in the Land Registry office of the Land Registry District within the limits of which the lands, mine, or premises affected by such lien are situate. 1891, c. 23, s. 24.

Section 24.

See Ont. Act, s. 24, *supra*, p. 123. This *section* probably applies only to liens on land, and not to liens on chattels under *section* 23.

Where a sub-contractor gives credit to his primary debtor extending beyond the time limited by this Act for bringing his action, it is thereby barred: *Burritt v. Renihan*, 25 Gr. 183; *Haggerty v. Grant*, 2 B. C. R. 173. So also the taking of a promissory note and negotiating it discharges the lien; and it does not revive on non-payment of the note: *Edmonds v. Tiernan*, 21 S. C. R. 406. As to the effect of taking security under the Ont. Act: see Ont. Act, s. 28, and notes, *supra*, p. 132 *et seq.*

Section 25.

When a registered lien shall be cancelled.

25. The Government Agent, Registrar-General, or District Registrar of Titles shall, on receiving a certificate under the seal of the Registrar of the Court wherein such action is pending, stating the names of the lienholders parties to such action, and that the amount due by the owner in respect of such liens has been ascertained and paid into Court in pursuance of an order of such Court or Judge, or that the property has been sold to realize such liens, or that such lien has been improperly filed, or that such lien has otherwise ceased to exist or on receiving a statement in writing signed by the claimant or his agent that the lien has been satisfied, cancel all liens registered by such parties. 1891, c. 23, s. 25.

See Ont. Act, s. 27, *supra*, p. 129.

Section 26.

Receipted pay rolls of woodman's wages must be produced.

26. Every person making or entering into any contract, engagement, or agreement with any other person for the purpose of furnishing, supplying, or obtaining timber or logs by which it is requisite and necessary to engage and employ workmen and labourers in the obtaining, supplying, and furnishing such logs or timber as aforesaid

shall, before making any payment for, or on behalf of, or under such contract, engage
 ment, or agreement of any sum of money, or by kind, require such person to whom payment is to be made, to produce and furnish a pay-roll or sheet of the wages and amount due and owing, and of the payment thereof, which pay-roll or sheet may be in the form of Schedule C annexed to this Act, or if not paid, the amount of wages or pay due and owing to all the workmen or labourers employed or engaged on or under such contract, engagement, or agreement at the time when the said logs or timber is delivered or taken in charge for, or by, or on behalf of, the person so making such payment and receiving the timber or logs. 1891, c 23, s. 26. Section 26.

There is no similar provision to this in the Ont. Act. See, however, "*The Woodman's Lien for Wages Act*," (R. S. O. c. 154).

27. Any person making any payment under such contract, engagement, or agreement without requiring the production of the pay-roll or sheet as mentioned in section 26 of this Act, shall be liable, at the suit of any workman or labourer so engaged under said Section 27.

Person not requiring production of receipted pay roll shall be liable at suit of workman.

Section 27. contract, engagement, or agreement, for the amount of pay so due and owing to said workman or labourer under said contract, engagement, or agreement. 1891, c. 23, s. 27.

There is no similar provision to this in the Ont. Act. See, however, "*The Woodman's Lien for Wages Act*," (R. S. O. c. 154).

Section 28. **28.** The person to whom such pay-roll or sheet is given shall retain, for the use of the labourers or workmen whose names are set out in such pay-roll or sheet, the sums set opposite their respective names which have not been paid, and the receipt or receipts of such labourers or workmen shall be a sufficient discharge therefor. 1891, c. 23, s. 28.

Sums mentioned in pay roll as unpaid to be retained.

There is no similar provision to this in the Ont. Act. See, however, "*The Woodman's Lien for Wages Act*," (R. S. O. c. 154)

Section 29. **29.** Every Government Agent in whose office any affidavit or document shall be filed under the provisions of this Act shall forthwith after such filing transmit to the Land Registry office of the Land Registry District within the limits of which the lands,

Government Agent to transmit copies of lien records to Land Registry office.

mine, or premises affected by such affidavit or document are situate, a true copy, certified under his hand, of such affidavit or document, and the copy so certified shall be filed in the Land Registry office, in the manner prescribed by this Act for the filing of original documents therein under this Act. Section 29.
—

There is no similar provision to this in the Ont. Act.

30. The Judges of the County Court, or any two of them, may make general rules and regulations, not inconsistent with this Act, for expediting and facilitating the business before such Court under this Act, and for the advancement of the interests of suitors therein. Section 30.
—

Judges of County Court to make Rules of Court.

1891, c. 23, s. 29.

There is no similar provision to this in the Ont. Act.

No Rules have as yet been made.

31. The "Mechanics' Lien Act, 1888" (being Chap. 74 of the Consolidated Acts, 1888), the "Mechanics' Lien Amendment Act, 1889," and the "Mechanics' Lien Amendment Act, 1890." are hereby repealed. Section 31.
—

Repeal of former Acts

1891, c. 23, s. 30.

SCHEDULE A.

In the matter of the "Mechanics' Lien Act," and in the matter of a lien claimed by

I, _____ of _____
British Columbia, make oath and say :—

1. That _____ of _____ claim
a mechanic's lien against the property or interest hereinafter men-
tioned, whereof _____ is owner.

2. That the particulars of the work done are as follows :—(a)

3. That the work was finished or discontinued on or about the
_____ day of _____

4. That the said [*insert name of person claiming the lien*] was in
the employment of _____, contractor for the work
in respect of which the lien is claimed, for _____ days
after the above mentioned date.

5. That the sum of _____ dollars is owing to
_____ in respect of the same, and was due
on the _____ day of _____

6. That the description of the property to be charged is as
follows :—

Sworn at _____ B. C., this _____ day
of _____ A. D. _____, before me.

1891, c. 23, Sch. A.

(a) See note to s. 3, *supra*, p. 271.

SCHEDULE B.

"MECHANICS' LIEN ACT."

Particulars of work to be done for _____ of
 _____, owner, by
 _____, contractor.

[*Here insert nature and location of work, and nature of interest of owner in the land.*]

Amount of contract, _____ dollars.

Dated the _____ day of _____, 18 .

(Signed)

Owner.

Contractor.

SCHEDULE C.

PAY-ROLL.

Name.	Description.	From 5th January, 1891, to 10th January, 1891, (inclusive)			Amount paid.	Date of payment.	Received payment in full.
		Number of days employed	Rate per day.	Total amount earned.			
R. Roe.		Six days.	\$3 50.	\$21.00	\$21.00	12th Jan., 1891.	R. Roe

I hereby certify that the above statement is correct to the best of my knowledge and belief, and is made by me in compliance, and in accordance with section 12 of the "Mechanics' Lien Act, 1891," on account of (my contract to, or employment by, *as the case may be*) [*here insert brief description of the work*] for (owner's name) up to the _____ day of _____ 18 .

(Signed)

Contractor.

Dated _____ day of _____, 18 .

1891, c. 23, Sch. C.

APPENDIX.

ADDITIONAL FORMS.

1. FORM OF RECEIPT IN DISCHARGE OF LIEN, UNDER
ONTARIO ACT, SECTION 27.

Appendix.

I (*name of lien-holder*) acknowledge to have received Form of receipt in discharge of registered lien under s. 26.
 from (*name of "owner" or other person making payment*)
 \$ in full discharge of my mechanics' lien as a
 [contractor or sub-contractor, *as the case may be*] upon
 lot (*give short description of land sufficient for registration*
purposes, e.g., the westerly 40 feet of lot 36, on the north
side of Street, according to plan No. , regis-
 tered in the City of).

Dated this , day of , 18 .

(*Signature of lien-holder.*)

WITNESS :

(*Signature of witness.*)

2. AFFIDAVIT VERIFYING RECEIPT IN DISCHARGE OF
LIEN, UNDER ONTARIO ACT, SECTION 27.

COUNTY OF

To wit :

In the matter of the Mechanics' and Wage-Earners'
 Lien Act.

I, , of (*state residence and occupation*) Form of affidavit verifying receipt.
 make oath and say :

Appendix.

1. I was personally present, and did see (*name of lien-holder giving receipt*) duly sign the above [*or annexed or within, as the case may be*] written receipt.

2. That I well know the said (*name of lien-holder*), and the said receipt was signed by him at the (*state place where receipt signed.*)

(*Signature of deponent.*)

Sworn before me, at }
 , this }
day of . }

(*Signature of commissioner.*) (a)

A Commissioner, etc.

3. DEMAND OF TERMS OF CONTRACT UNDER ONT. ACT, SECTION 29.

To Mr. (*name of owner*).

Take notice that I claim to be a lien-holder under *The Mechanics' and Wage-Earners' Lien Act* upon (*describe shortly the premises in question*) under a contract made by me with C. D. (*name of contractor*) and I do hereby require you to furnish me with the terms of the contract or agreement existing between you and the said C. D. in reference to [the building *or* the carpenter work of the building now being erected upon the said premises, *or*

(a) The affidavit may be sworn before a commissioner for taking affidavits : see *R. S. O. c. 74, s. 12* ; and possibly before a notary Public : see *R. S. O. c. 175, ss. 3, 4*,

as may be] and the amount over due and unpaid upon such contract pursuant to *section 29 of the Mechanics' and Wage-Earners' Lien Act.* Appendix.

(Signature of lien-holder.)

Dated, etc.

4. STATEMENT OF CLAIM IN AN ACTION TO ENFORCE MECHANICS' LIEN OF CONTRACTORS.

(Title of Court and cause).

The plaintiff, J. E., is a builder, carrying on business in the City of Toronto, in the County of York, and the plaintiff, W. B., is a bricklayer, also carrying on business in the said City of Toronto. Form of statement of claim in action by contractor.

1. On the 11th day of November, 18 , the defendant was, and she has ever since remained, and now is, the [owner in fee simple of the lands and *or* lessee of certain leasehold] premises in the City of Toronto, in the County of York, more particularly described in the claim or lien hereinafter set forth. (a)

2. On or about the said 11th day of November, the plaintiffs, who are mechanics, were employed by the said defendant to perform certain work and to furnish certain materials for the erection of a brick hotel upon the said land for the said defendant, and there was no agreement

(a) If the lien has not been registered before action, this paragraph should set forth the lands upon which the lien is claimed, and should be modified accordingly.

Appendix.

between the said defendant and the plaintiffs that the plaintiffs should not be entitled to a lien upon the said lands and buildings for the price of the said work and materials (*b*).

Statement
of claim.

3. In pursuance of the said employment, the plaintiffs did do a large amount of work upon and did furnish large quantities of materials, which were used in and about the erection of the said brick hotel upon the said lands, to the value of \$18,000, and completed the same on the 4th day of September, 18 , whereby the defendant became indebted to the plaintiffs for the said work and materials in the said sum of \$18,000.

4. The sum of \$15,000 has been paid on account of the said sum of \$18,000, leaving a balance of \$3,000 still due and payable to the plaintiffs.

5. By reason of being so employed, and doing the said work, and furnishing the said materials, as aforesaid, the plaintiffs became and are entitled to a lien on the estate and interest of the defendant to the said lands for the sum of \$3,000, under the provisions of "*The Mechanics' and Wage-Earners' Lien Act.*"

(*If the lien has been registered before action, proceed as follows :*)

[6. On the 21st day of September, 18 , the plaintiffs, in pursuance of the said Act, caused to be registered in the Registry Office, in and for the [City of Toronto, *or as may be*] a claim of lien, which claim is in the words and figures following, that is to say : (*c*)

(*b*) *Rathburn v Burgess*, 17 C. L. J. 111. There is no lien for materials in British Columbia : see *supra*, p. 264.

(*c*) Where a lien is registered before action, it is necessary that the action should be commenced within ninety days from

“ J. E., of the City of Toronto, in the County of York, builder, and W. B., of the same place, bricklayer, under ‘ *The Mechanics’ and Wage-Earners’ Lien Act*,’ claim a lien upon the estate of M. A. T., of the said City of Toronto, in the undermentioned land, in respect of the following work [and materials, (d)] that is to say :

To amount of contract \$17,000

Bill of Extras.

To extra stone in foundation	500
“ Brick pointing	200
“ Second flats of extra $\frac{1}{4}$ -bricks in thickness	300
	<hr/>
	\$18,000

1873.

Dec. 1.—By cash	\$2,000
“ 22.— “	1,000

1874.

Jan. 5.— “	5,000
July 6.— “	7,000
	<hr/>
	\$15,000

Balance \$3,000

which work was done [and materials (d)] were furnished for the said M. A. T. between the 1st day of May, A.D.

the day on which the work was completed, or materials or machinery furnished, or the period of credit mentioned in the registered claim expired : see Ont. Act, *sections 24, 25, supra*, pp. 123, 127.

(d) No lien can be claimed for materials in British Columbia : see *supra*, p. 264.

Appendix.

6. The work mentioned in the above particulars was completed on (*stating the true date of the completion, which should be within thirty days prior to the issue of the writ*): see section 23, [*or, the said machinery mentioned in the above particulars was supplied [or placed] upon the said lands in the first paragraph hereof mentioned on stating when the delivery of the machinery was completed, which should be a day within thirty days prior to the issuing of the writ*].

6a. A certificate of *lis pendens* has been issued in this action, and duly registered in the registry office for , on the day of (*naming a day within thirty days from the completion of the work, or the delivery or placing of the machinery in respect of which the lien is claimed.*) (f.)

7. The lands referred to in the first paragraph hereof, [and particularly described in the said claim of lien hereinafter set forth,] (g) are the lands occupied by and usually enjoyed with the said hotel.

tration of the claim before action is unnecessary: see section 23. Where a statement of claim shows that the registered claim was not in proper form, or not registered within the time limited by the Act, the statement of claim was formerly demurrable: *Roberts v. McDonald*, 15 O. R. 80.

(f) When the action is commenced by filing a statement of claim under Ont. Act, s. 32 (2), this allegation would have to be omitted, though it appears to be one that would have to be proved at the trial.

(g) The words in brackets should be omitted when the lien has not been registered before action.

Appendix

The plaintiffs claim :—

1. That the defendant may be ordered to pay to the plaintiffs forthwith the said sum of \$3,000, together with the interest thereon and the costs of this action.
2. And that in default of such payment, all the estate and interest of the defendant in the said lands and buildings, or a competent part thereof, may be sold, and the proceeds thereof applied in or towards payment of the plaintiffs' debt and the costs of this action, pursuant to the said "*The Mechanics' and Wage Earners' Lien Act.*"
3. That for the purposes aforesaid all proper directions may be given and accounts taken.
4. Such further relief as the nature of the case may require.

The plaintiffs propose that this action should be tried at Toronto.

Delivered the day of , 18 , by X. Y. Z.,
of , plaintiffs' solicitor.

5. STATEMENT OF CLAIM IN ACTION TO ENFORCE A
MECHANIC'S LIEN BY A SUB CONTRACTOR.

(*Style of Court and Cause.*)

Form of state-
ment of claim
in action by
sub-con-
tractor.

1. On the 11th day of November, 18 , the defend-
ant, M. A. T., was and she has ever since remained and
now is the [owner in fee simple of the lands and, *or*

lessee of certain leasehold] premises in the City of Toronto, in the County of York, (*if the plaintiff's lien has been registered, conclude as in preceding form, if not, say*) known and described as follows, that is to say : (*set out description of land over which lien is claimed.*) Appendix.

2. On or about the said 11th day of November, the said defendant. M. A. T., employed the defendant, C. D., to perform certain work and to furnish certain materials for the erection of a house upon the said land for the said defendant, M. A. T., for the price or sum of \$10,000.

3. The defendant, C. D., accepted the said employment, and agreed with the said M. A. T., to perform the said work and to furnish the said materials, and afterwards employed the defendant, E. T., to do part of the said work and furnish part of the materials required for the erection of the said house, for the sum of \$1,000, which employment the defendant, E. T., accepted, and he agreed with the said C. D. to do the work and furnish the materials last referred to for the said price or sum of \$1,000.

4. On the 11th day of December, 18 , the defendant, E. T., employed the plaintiff to do part of the work and furnish part of the materials for the erection of the said house which he had so agreed with the said defendant, C. D., to do and furnish as aforesaid, and agreed to pay the plaintiff therefor the price or sum of \$500; and there was no agreement (*a*) between the plaintiff and the said M. A. T., that the plaintiff should not be entitled to a lien for the work done and materials furnished by him, as hereinafter mentioned.

(a) *Rathburn v. Burgess*, 17 C. L. J. 111.

Appendix.

5. The plaintiff accepted the said employment, and in pursuance thereof the plaintiff did do a large amount of work upon, and did furnish large quantities of material in and about the erection of, the said house upon the said lands to the value of \$500, and completed the said work and the delivery of the said materials on the 5th day of January, 18 , whereby the defendant, E. T., became indebted to the plaintiffs for the said work and materials in the said sum of \$500.

6. The said work was done, and the said materials were furnished by the plaintiff in accordance with the terms of the contract or agreement between the said defendants, M. A. T. and C. D., and there is now due a large sum of money by the said M. A. T., under her contract with the said C. D., which the plaintiff claims equals or exceeds \$.

7. The sum of \$100 has been paid by the said E. T. on account of the said sum of \$500, leaving a balance of \$400 still due and payable by him to the plaintiff.

8. By reason of being so employed, and doing the said work and furnishing the said materials as aforesaid, the plaintiff became and is entitled to a lien on the estate and interest of the defendant, M. A. T., in the said lands for the said sum of \$400, under the provisions of the said "*The Mechanics' and Wage Earners' Lien Act.*"

If the lien has not been registered before action, proceed as follows :—

9. A certificate of *lis pendens* has been issued in this action and registered in the Registry Office for

on the day of (*naming the day, which should be within thirty days from the date mentioned in paragraph 5 as the date of the completion of the work, etc.*) (b). Appendix.

9. [*If the lien has been registered before action proceed as in paragraph 6 of preceding Form.*]

10. The lands referred to in the first paragraph of this statement of claim [*if so, and particularly described in the said claim or lien hereinbefore set forth*] are the lands occupied by and usually enjoyed with the said house.

11. The defendants, C. D. and E. T., have also done work and furnished materials in and about the erection of the said house and are entitled to liens in respect thereof upon the said lands under the said "*The Mechanics' and Wage Earners' Lien Act.*"

The plaintiff claims :—

1. That the defendant, E. T., may be ordered to pay to the plaintiff forthwith the said sum of \$400, together with interest and the costs of this action.
2. And that the defendant, M. A. T., may also be ordered to pay the same or such part thereof as the plaintiff, by virtue of his said lien and charge as aforesaid, is entitled to receive from the said M. A. T.

(b) Where the action is commenced by filing a statement of claim under Ont. Act, s. 31 (2), this allegation would have to be omitted, though it appears to be one that would have to be proved at the trial.

furnished by the said (*contractor*) for the defendant (*owner*) for wages for thirty days (*or any less period*) in priority to all other liens, and in priority to any claims by the defendant (*owner*) against the defendant (*contractor*) for, or in consequence of, the failure of the latter to complete his contract with the defendant (*owner*). Appendix.

7.—CLAIM AGAINST PRIOR MORTGAGEE. (*b*)

That prior to the commencement of the said work [*or* Form of claim against prior mortgagee. the delivery of the materials or machinery aforesaid] by indenture bearing date the day of the defendant (*owner, or other mortgagor*) did grant and mortgage the lands and premises aforesaid unto the defendant (*mortgagee*) to secure the payment of the sum of \$, and interest at the rate and at the days and times therein mentioned.

By reason of the construction, alteration or repair of the building [*or* the erection or placing of the materials or machinery] upon the lands aforesaid the selling value of the said lands has been increased by the sum of \$, and under the provisions of *The Mechanics' and Wage Earners' Lien Act* the plaintiff and other lienholders are entitled to a lien upon the said lands for the amount due to them to the extent by which the selling value thereof has been so increased in priority to the said mortgage.

The Plaintiff claims :

1. That the amount by which the selling value of the said lands has been increased by the

(*b*) See note (*a*) to Form 6, *supra*. See Ont. Act s. 7 (3), *supra*, p. 42.

Appendix.

work done and materials furnished by the plaintiff and other lien-holders (if any) entitled to the benefit of this action may be ascertained under the order and direction of this Honourable Court.

2. That the defendant (*mortgagee*) may be ordered to pay into Court, to the credit of this action, the amount which shall be found due to the plaintiff and other lien holders entitled to the benefit of this action in respect of their liens, or so much thereof as shall not exceed the amount by which the selling value of the said lands has been increased by the construction [alteration *or* repair] of the building [*or* the erection or placing of the materials *or* machinery] upon the said lands as aforesaid, and that the same when paid into Court may be paid out to the plaintiff and such other lien-holders as are entitled to share therein, subject to the payment of the plaintiff's costs
3. That in default of the defendant (*mortgagee*) making such payment, the said land may be sold freed from the said mortgage, and that the increased price which may be realized from such sale by reason of the work done and materials furnished as aforesaid may be ascertained, and that the same may be ordered to be applied in payment of the liens of the plaintiff and other lien-holders entitled to the benefit of this action, subject to the payment of the plaintiff's costs.

8. FORM OF INTERLOCUTORY INJUNCTION RESTRAINING THE REMOVAL OF BUILDINGS OR MACHINERY, ETC., UNDER ONTARIO ACT, SECTION 16. Appendix.

(Formal part of order as usual.)

And the plaintiff [in person *or* by his counsel] undertaking to abide by any order this Court may make as to damages in case this Court shall hereafter be of opinion that the defendant [*or* defendants, or any or either of them] shall have sustained any by reason of this order which the plaintiff ought to pay.

Form of interlocutory injunction restraining removal of buildings, etc.

This Court doth order that the defendant, his [*or* the defendants, their] servants, workmen and agents be and they are hereby restrained until* the day of next, and until any motion which may on that day be made to continue this injunction shall have been disposed of,* from moving from the premises known as and being (*describe lands subject to lien*) any of the buildings, erections, material or machinery now standing, lying or being thereon. (*a*)

9. FORM OF INJUNCTION RESTRAINING REMOVAL OF BUILDINGS OR MACHINERY, ETC. (*b*)

(Formal parts of judgment, as usual.)

The Court doth order and adjudge that the defend-

Form of injunction granted at trial, restraining removal of buildings, etc.

(*a*) Where the injunction is subsequently continued to the trial the order may be in a similar form to the above, substituting for the words between the * * the words "the trial or other final disposition of this action."

(*b*) This form is only suitable to be inserted in a judgment. For form of an interlocutory injunction granted pending the action see Form No. 8.

Appendix.

ant, his [*or* defendants, their] servants, workmen and agents, be, and they are hereby, restrained from removing from off the premises known as and being (*describe lands subject to lien*) any of the buildings, erections, material or machinery now standing, lying or being thereon until the liens of the plaintiff and other lienholders entitled to the benefit of this action upon the said lands shall have been satisfied, or this Court shall make other order to the contrary.

10. FORM OF ORDER VACATING LIEN.

(*Title of cause or matter.*)

Form of order
vacating lien.

Upon the application of (*owner*) in presence of the solicitor for (*lien-holder*), and upon hearing read (*affidavits and other papers upon which application founded*), It is ordered that the claim of (*name of lien holder*) to a lien upon the estate or interest of (*name of owner*) in the following lands, viz. : (*description of lands as in registered claim*), in respect of the following work [*or materials*], that is to say, (*describe it as in the registered claim*) done [*or furnished*] for (*name of person for whom work done or materials furnished as in registered claim*) on or before the day of , and in respect of which the sum of \$ was claimed by the said (*lien-holder*) as due [*or to become due*] and which said claim was registered in the Registry Office of on the day of at o'clock as No. , be and the same is hereby vacated and discharged.

11. FORM OF NOTICE OF SALE OF CHATTELS TO BE Appendix.
PUBLISHED, AND SERVED ON OWNER.

Auction Sale.

Whereas (*name of person indebted*) is indebted to the undersigned in the sum of \$ for [work done and materials supplied in the alteration or improvement of one spring waggon], and three months have elapsed since the said sum ought to have been paid, and default has been made in payment thereof, notice is hereby given that on next, the day of , at (*place of sale*, e.g. the auction rooms of C. D., No. 6 King Street West, in the City of Toronto), the said (*describe chattel*) will be sold by (*name of auctioneer*), by public auction.

Form of notice
of sale of
chattels to
satisfy lien,
under s. 51.

(If the sale is to be subject to a reserved bid, or other special conditions, it should be so stated.)

Date, etc.

(Signature of lien-holder.)

(a) See Ont. Act, s. 51, *supra* p. 179; and B. C. Act, s. 23, *supra* p. 283.

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